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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

KENNETH ROBINSON,

Petitioner,

vs.

MICHAEL ADAMS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in a Title VII disparate impact case challenging discrimination against black men, an employer with no black male employees is entitled to summary judgment based on the fact that it has some black female employees.

2. Whether, in order to withstand a motion for summary judgment, the plaintiff in a Title VII disparate impact case is required (a) to establish adverse impact, (b) to identify specific employment practices or selection criteria, and (c) to show the causal relationship between the identified practices and the adverse impact.

3. Whether summary judgment is appropriate in a disparate treatment case under Title VII and 42 U.S.C. § 1981 where the record contains conflicting evidence as to the employer's knowledge of the plaintiff's race.

LIST OF PARTIES

The parties to the proceedings below were petitioner Kenneth Robinson and respondents Michael Adams, Dianne R. Coe, Georgia McCarthy, Martin Moshier, Lura Scovil, Joan Wilson, County of Orange, Orange County Superior Court, and L. B. Utter. Ben Avillar and Maria Bastanchury were also named as defendants in the district court.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

KENNETH ROBINSON,

Petitioner,

v.

MICHAEL ADAMS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Kenneth Robinson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on May 27, 1988.

OPINIONS BELOW

The amended opinion of the court of appeals for the Ninth Circuit is reported at 847 F.2d 1315, and is reprinted in the appendix to the petition, p.4a. The order of the court of appeals amending its prior opinion, denying rehearing, and rejecting the suggestion for rehearing en banc is

unreported and is reprinted in the appendix, p. 4a. The superseded opinion of the court of appeals is reported at 830 F.2d 128, and is not reprinted in the appendix.

The order of the United States District Court for the Central District of California granting partial summary judgment in favor of the respondents as to petitioner's claims under 42 U.S.C. § 1981 is unreported and is reprinted in the appendix, p. 77a. The memorandum and order of the district court granting summary judgment in favor of the respondents as to all claims is unreported and is reprinted in the appendix, p. 18a. The partial report and recommendation of the United States magistrate is reprinted in the appendix, p. 81a, and the second partial report and recommendation of the

magistrate is reprinted in the appendix, p. 34a.

JURISDICTION

The court of appeals entered its final judgment and denied a timely petition for rehearing and suggestion for rehearing en banc on May 27, 1988. On August 23, 1988, Justice O'Connor ordered that the time for filing this petition for writ of certiorari be extended to and including September 24, 1988. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1981 of 42 U.S.C. provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties,

taxes, licenses, and exactions of every kind, and to no other.

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

In the summer of 1983 plaintiff Kenneth Robinson, the petitioner in this Court, applied for four separate jobs with the County of Orange, California, and the

Orange County Superior Court. (App. 4a).[1] As part of each application, Robinson filled out a demographic questionnaire on which he indicated that he is a black male.[2] (App. 6a). Each application was denied at the initial screening phase; Robinson was not hired for any of the four positions. (App. 4a-5a).

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[1] Robinson applied for jobs as an Administrative Analyst III, Employment Services Representative IV, Investigator-Special Services, and Probate Examiner I. (App. 37a).

[2] That portion of the application states: "Orange County is asking all applicants for positions to complete this form in order to comply with United States government equal employment opportunity requirements. Information you provide will not be used in any way as part of the testing process. This flap will not be duplicated or made available to hiring department. Data collected is used for statistical purposes and to measure the County's effectiveness of recruiting efforts." (App. 6a) (emphasis in original). Petitioner Robinson checked boxes indicating that he is black (not of Hispanic origin), male, and 40 years old or older.

After filing an administrative charge of discrimination with the Equal Employment Opportunity Commission and receiving a notice of right-to-sue from the United States Department of Justice, Robinson filed a pro se action in the district court, alleging that the defendants (the County of Orange, Orange County Superior Court, and certain County officials and employees) had engaged in racial discrimination in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964. Robinson made a "disparate treatment" claim under § 1981 and Title VII, alleging that the defendants had intentionally discriminated against him because of his race or color. He also made a "disparate impact" claim under Title VII, alleging that the defendants' employment practices had a substantial and unjustified adverse impact on blacks in

general and black males in particular. Robinson filed, along with the complaint, a timely demand for a jury trial. (Compl., p. 20, Dkt. Nr. 1).

The case was assigned to a magistrate, who issued reports recommending that the district court grant the defendants' motions for summary judgment on the § 1981 claims (App. 111a) and on the Title VII disparate treatment claims. (App. 75a). The magistrate recommended, however, that the court deny the defendants' motion for summary judgment on the Title VII disparate impact claims. (App. 76a).

With respect to the § 1981 and Title VII disparate treatment claims, the magistrate stated that Robinson's written applications for three of the four jobs (Administrative Analyst III, Employment Services Representative IV, and Inves-

tigator, Social Services) did not contain information establishing that he possessed the specific qualifications sought in the County's job announcements, and that Robinson therefore had failed to "apply" for the jobs within the meaning of this Court's decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), as interpreted by the Ninth Circuit in Tagupa v. Board of Directors, 633 F.2d 1309 (9th Cir. 1980). (App. 48-49a; 54-56a; 59a; 92-93a; 100-101a; 103-104a). The magistrate also recited the respondents' contention that Robinson's application for Probate Examiner I was rejected "because he was not deemed to be one of the most qualified applicants." (App. 105a).

The magistrate stated an additional reason for recommending summary judgment with respect to Robinson's disparate treatment claims based on his applications

for Administrative Analyst III and Probate Examiner I. Although each of Robinson's applications included the demographic questionnaire indicating that he is a black male, the magistrate relied on declarations provided by two of the individual defendants in concluding that those defendants were not aware of Robinson's race when they rejected his applications. (App. 48a; 63a). Thus, the magistrate recommended that the district court grant summary judgment for the defendants on all § 1981 claims and on all Title VII disparate treatment claims. In separate orders, the district court approved and adopted the magistrate's findings, conclusions, and recommendations in all these respects. (App. 18a, 79a).

With respect to the Title VII disparate impact claims, the magistrate found that Robinson had sufficiently, albeit vaguely,

identified three challenged employment practices: (1) discounting education over experience; (2) not permitting testing for persons of a protected class who meet minimum qualifications; and (3) using subjective judgment in determining whether applicants meet stated minimum qualifications. (App. 67-68a). As the magistrate also noted, the record showed that the Orange County Superior Court employed no black males as of April 1984. (App. 68a).

The defendants offered evidence that the percentage of blacks employed by Orange County was higher than the percentage of blacks in the County's population or labor force. (App. 69a). Robinson, on the other hand, offered evidence that the percentage of blacks employed by Orange County was lower than the percentage of blacks in the combined population of Orange County and the

surrounding counties. (See App. 8-9a). The magistrate therefore concluded that there was a "genuine issue of material fact" as to "whether the defendants maintained employment practices which had an adverse impact upon black males or black males over 40 years old," (App. 70a), and he recommended that the district court deny defendants' motion for summary judgment on those claims. (App. 75a).

Rejecting the magistrate's recommendation regarding the disparate impact claims, the district court granted summary judgment in favor of the defendants on these claims as well as the disparate treatment claims. The court stated that the challenged employment practices were "only vaguely described," and that Robinson had "not offered any statistics which show or tend to show that the challenged employment practices dispropor-

tionately exclude black male job applicants." (App. 30a). The district court held that Robinson "was not able to demonstrate the existence of a prima facie case at the summary judgment motion," and therefore granted summary judgment in favor of the defendants as to all claims. (App. 32a).

On Robinson's pro se appeal, a divided panel of the Ninth Circuit affirmed the district court's judgment. With regard to the § 1981 and Title VII disparate treatment claims, the majority opinion did not address the question whether Robinson had adequately "applied" for the jobs, but focused instead on the question whether the defendants were aware of his race. Although the majority's opinion acknowledged that "the credibility of the application screeners could be a triable issue," (App. 7a), the majority relied on

the screeners' declarations denying knowledge of Robinson's race and held that "no genuine issue exists as to whether the application screeners were aware of his race." (Id.).

The Ninth Circuit majority also affirmed the district court's grant of summary judgment in favor of the defendants on Robinson's Title VII disparate impact claims. Although the record showed that the Orange County Superior Court had no black male employees, the majority rejected Robinson's efforts to compare the racial composition of the defendants' work force with the racial composition of the population in Orange County and the surrounding counties; the majority stated that Robinson had failed to establish "that these general population statistics represent a pool of prospective applicants

qualified for the jobs for which he applied." (App. 9a).

Additionally, the majority held that Robinson's showing that there were no black male employees did not present a genuine issue of material fact on his disparate impact claims in view of evidence that the percentage of black female employees was slightly above the percentage of blacks in the Orange County population.[3] (Id.). Finally, the majority held that Robinson had failed to establish a sufficient "prima facie case of disparate impact on Black males" because he did not "'identify specific employment practices or selection cri-

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[3] The majority opinion notes that, "in 1984, although Blacks represented 1.2% of the Orange County population, 1.7% of the Superior Court work force was Black and 2.7% of both the 'Professional' and 'Official/Administration' positions in the County of Orange were held by Blacks." (App. 9a).

teria,'" and because he did not "'show the causal relationship between the identified practices and the impact.'" (Id.) (quoting Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1482 (9th Cir. 1987) (en banc), on remand, 827 F.2d 439, 441 (9th Cir. 1987), cert. granted, 56 U.S.L.W. 3887 (June 28, 1988). The majority concluded that, "[b]ecause Robinson has not pointed to evidence creating a genuine dispute about facts material to a prima facie case of disparate impact, summary judgment was appropriate on this issue." (App. 9-10a).

Judge Pregerson dissented as to both the disparate treatment claims and the disparate impact claims. He first noted that, in reviewing a grant of summary judgment, the evidence should be viewed in the light most favorable to the nonmoving party, and that "Title VII is 'a remedial

statute to be liberally construed in favor of the victims of discrimination,' ... [p]articularly where, as here, a layperson brings a Title VII action pro se ...." (App. 11a) (citations omitted).

With respect to the disparate treatment claims, the dissent found that the record contained concrete evidence "that the County employees who considered Robinson's application may have known he was black" -- viz., copies of Robinson's job applications, which had been supplied by the defendants in discovery with the racial information still attached. (App. 12a). "[B]y keeping this information physically attached to other employment information, the County runs a risk that employees making employment decisions will be aware of racial and other demographic factors that might lead to discrimination." (Id.). In the dissenting judge's

view, the credibility of the employees who denied knowledge of Robinson's race, coupled with the concrete evidence that they may have known his race, presented genuine issues of material fact sufficient to withstand summary judgment on the disparate treatment claims.

With respect to the disparate impact claims, the dissent noted Robinson's evidence "that the Orange County Superior Court has no black male employees, and that the overall representation of blacks (all women) among its employees is 1.7%." (App. 13a) (emphasis in original). The fact that blacks constituted only 1.2% of Orange County's population did not conclusively justify "the startlingly low levels of black employment in the Orange County Superior Court ..."; the defendants should have been required to come forward with "statistics concerning the actual

pool of applicants for the positions for which Robinson applied." (App. 13a). The dissenting judge also believed that the case should be remanded to the district court for further findings as to the relevant labor market under this Court's decision in Hazelwood School District v. United States, 433 U.S. 299 (1977). (App. 14a).

Finally, citing this Court's decisions in Connecticut v. Teal, 457 U.S. 440 (1982), and Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978), as well as the Fifth Circuit's decision in Jeffries v. Harris County Community Action Association, 615 F.2d 1025 (5th Cir. 1980), the dissent rejected the majority's apparent conclusion that the defendants' employment of black females was a complete defense to Robinson's claim of discrimination against

black males as a class. The dissent would hold instead "that the evidence presented by Robinson is sufficient to make out a prima facie case of disparate impact on black males." (App. 15a). Because Robinson had raised "a genuine issue of material fact on whether blacks and particularly black males are proportionally represented in the court's work force," in the dissent's view summary judgment should not have been granted in favor of the defendants on the disparate impact claims. (App. 13a).

Robinson filed a timely petition for rehearing and suggestion for rehearing en banc. A majority of the original Ninth Circuit panel voted to deny the petition for rehearing and to reject the suggestion of rehearing en banc. A majority of the judges of the full court also voted to

reject the suggestion for rehearing en banc. (App. 4a).

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT MAJORITY'S REJECTION OF PETITIONER'S TITLE VII DISPARATE IMPACT CLAIM OF DISCRIMINATION BASED ON RACE AND SEX IS CONTRARY TO THE DECISIONS OF THIS COURT AND INCONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS.

The Ninth Circuit majority held in part that Robinson's evidence of disparate impact against black males (indeed, he showed that the Orange County Superior Court did not employ a single black male) was not sufficient to withstand the defendants' motion for summary judgment because blacks as a group were not statistically underrepresented in the defendants' work force. (App. 9a). In effect, the court below treated the defendants' employment of black females as a defense to Robinson's claims that the defendants discriminated against black males. As the

dissent observed, this holding is contrary to the prior decisions of this Court and it conflicts with the decisions of other circuits.

In Connecticut v. Teal, 457 U.S. 440 (1982), this Court rejected the "bottom line" defense in Title VII disparate impact cases. The Court stated:

> It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group. We recognized in Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978), that fairness to the class of women employees as a whole could not justify unfairness to the individual female employee because the 'statute's focus on the individual is unambiguous.' Id., at 708. Similarly, in Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam), we recognized that a rule barring employment of all married women with preschool child-ren, if not a bona fide occupational qualification under § 703(e), violated Title VII, even though female applicants without preschool children were hired in sufficient numbers that they constituted 75 to 80 percent of the persons employed in the position plaintiff sought.

457 U.S. at 455 (emphasis in original).

Thus, the majority opinion below, insofar as it treats the employment of black females as a justification for discrimination against the plaintiff and other black males, is contrary to this Court's decisions in Teal, Manhart, and Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam). See also Furnco Construction Corp. v. Waters, 438 U.S. 567, 579 (1978) ("[i]t is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force") (emphasis in original).

The decision of the majority below also conflicts with the decisions of other circuits. In Jeffries v. Harris County

Community Action Association, 615 F.2d 1025 (5th Cir. 1980), a black woman brought a Title VII action charging the defendants with discrimination in promotion based on both race and sex. The Fifth Circuit affirmed the district court's judgment against the plaintiff on the merits of her race discrimination claim, remanded the case for further findings on her sex discrimination claim, and held that that the district court had improperly failed to address her claim of discrimination based on both race and sex. 615 F.2d at 1032.

Noting that Title VII provides a remedy for discrimination on the basis of "race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a) (emphasis added), the Fifth Circuit in Jeffries stated that Congress' use of the word "or," and its refusal to adopt an amend-

ment that would have added the word "solely" to modify the word "sex," demonstrated the intent of Congress "to prohibit employment discrimination based on any or all of the listed characteristics." 615 F.2d at 1032. Moreover, "[i]n the absence of a clear expression by Congress that it did not intend to provide protection against discrimination directed especially toward black women as a class separate and distinct from the class of women and the class of blacks," the court could not "condone a result which leaves black women without a viable Title VII remedy." Id.

Additionally, the Fifth Circuit in Jeffries felt that recognition of the plaintiff's race-sex claim was mandated by this Court's decision in Phillips v. Martin Marietta Corp., supra, and other "sex plus" cases; just as employers may

not apply different standards to women with young children, married women, or women who are single and pregnant, so also are employers prohibited from singling out for discriminatory treatment a class of women who are black. 615 F.2d at 1033-1034. Indeed, "[t]his would be a particularly illogical result, since the 'plus' factors in the former categories are ostensibly 'neutral' factors, while race itself is prohibited as a criterion for employment." Id. at 1034 (footnote omitted).

The Fifth Circuit concluded as follows:

> Recognition of black females as a distinct protected subgroup for purposes of the prima facie case and proof of pretext is the only way to identify and remedy discrimination directed toward black females. Therefore, we hold that when a Title VII plaintiff alleges that an employer discriminates against black females, the fact that black males and white females are not subject to discrimination is irrelevant and must not form any part of the basis for a finding

> that the employer did not discriminate against the black female plaintiff.

615 F.2d at 1034.

The Tenth Circuit followed Jeffries in Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987). The plaintiff in Hicks, also a black woman, brought a Title VII action alleging racial and sexual harassment on the job. The Tenth Circuit, stating that "the Jeffries ruling is correct," held that the plaintiff was permitted to "aggregate evidence of racial hostility with evidence of sexual hostility" in pursuing a combined race-sex discrimination claim. 833 F.2d at 1416 (footnote omitted).[4] See also Chambers v.

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[4] The Eighth Circuit has noted but not decided this issue. In DeGraffenreid v. General Motors Assembly Division, 558 F.2d 480 (8th Cir. 1977), the court reviewed a district court decision refusing to recognize a combined race-sex claim under Title VII. The Eighth Circuit stated that it did "not subscribe entirely to the district court's reasoning in rejecting appellants' claims of race and

Omaha Girls Club, 629 F. Supp. 925, 946 n.34 (D. Neb. 1986), aff'd, 834 F.2d 697 (8th Cir. 1987) (following Jeffries); Graham v. Bendix Corp., 585 F. Supp. 1036, 1047 (N.D. Ind. 1984) ("[u]nder Title VII, the plaintiff as a black woman is protected against discrimination on the double grounds of race and sex, and an employer who singles out black females for less favorable treatment does not defeat plaintiff's case by showing that white

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sex discrimination under Title VII," but it affirmed the district court's judgment on other grounds. 558 F.2d at 484.

females or black males are not so unfavorably treated").

II.

THIS COURT HAS GRANTED CERTIORARI IN ANOTHER CASE TO REVIEW THE PRIMA FACIE CASE STANDARD APPLIED BY THE NINTH CIRCUIT TO DISPARATE IMPACT CLAIMS UNDER TITLE VII.

In an effort to defeat the defendants' summary judgment motion in the district court, Robinson presented undisputed evidence that the Orange County Superior Court employed no black men, and he identified several practices that he believed were responsible for the absence of black male employees. (App. 67-70a). The Ninth Circuit majority affirmed summary judgment in favor of the defendants on Robinson's disparate impact claims not only because the Superior Court employed black women, see supra, but also because Robinson did not present evidence sufficient, in the majority's view, to

make out a prima facie case of disparate impact discrimination.

In particular, the majority below ruled that a plaintiff must show the following to make out a prima facie Title VII disparate impact case: (1) significant adverse impact against the protected group of which the plaintiff is a member; (2) specific identified employment practices or criteria; and (3) a causal relationship between the identified practices and the impact. (App. 9a). In support of this ruling, the Ninth Circuit majority cited Atonio v. Wards Cove Packing Co., 810 F. 1477, 1482 (9th Cir. 1987) (en banc).

Subsequent to the decision of the court below, this Court granted certiorari to review the elements and application of the Ninth Circuit's disparate impact prima facie case standard. Atonio v. Wards Cove

Packing Co., No. 87-1388, 56 U.S.L.W. 3887 (June 28, 1988), granting cert. to 827 F.2d 439 (9th Cir. 1987). The Court, therefore, should hold the present petition pending the resolution of Atonio this Term.

III.

THE NINTH CIRCUIT MAJORITY'S AFFIRMANCE OF SUMMARY JUDGMENT AGAINST PETITIONER ON HIS CLAIMS OF INTENTIONAL DISCRIMINATION, IN THE FACE OF CONFLICTING EVIDENCE, IS CONTRARY TO THE DECISIONS OF THIS COURT. MOREOVER, THIS COURT HAS GRANTED CERTIORARI IN ANOTHER CASE TO REVIEW A SUBSTANTIALLY SIMILAR QUESTION.

As the dissent points out, the record in this case contains conflicting evidence as to whether the Superior Court officials who rejected Robinson's employment applications knew his race. (App. 11-11a). Robinson relied on copies of his applications, which had been supplied in discovery by the defendants from their own files with demographic questionnaires

still attached, plainly stating that he was black. (App. 12a). The officials, on the other hand, submitted declarations disclaiming any such knowledge. In the dissent's view, the credibility of those officials, coupled with the concrete evidence provided by the employment applications and the inferences that could reasonably be drawn from that evidence, presented genuine issues of fact for trial. (App. 12-13a). The majority below, however, affirmed summary judgment for the defendants on Robinson's disparate treatment claims under Title VII and 42 U.S.C. § 1981. (App. 7-8a).

In a case involving claims of intentional discrimination, the ultimate issue is the state of mind or intent of individuals. This Court has declared in numerous cases that a question regarding the state of mind of an individual "does

not readily lend itself to summary disposition," Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979); that "[s]ummary judgments ... are not appropriate 'when motive and intent play leading roles,'" White Motor Co. v. United States, 372 U.S. 253, 259 (1963); and that "summary procedures should be used sparingly ... where motive and intent play leading roles, the proof is largely in the hands of the alleged [wrongdoers], and hostile witnesses thicken the plot." Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962) (footnote omitted).

The Court has granted certiorari to review a substantially similar question in Harbison-Walker Refractories v. Brieck, No. 87-271, 56 U.S.L.W. 3647 (March 21, 1988), a disparate treatment case brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq.

Harbison-Walker, like the present case, concerns the proper standards for granting summary judgment where the plaintiff has requested a jury trial on claims of intentional discrimination.[5] If the Court does not grant the present petition, it should hold the petition pending the resolution of Harbison-Walker this Term.

CONCLUSION

For the above reasons, certiorari should be granted to review the judgment and opinion of the Ninth Circuit. Alternatively, the Court should hold this

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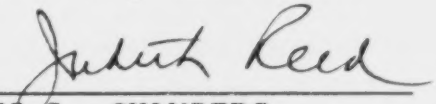
[5] The petitioner's brief in Harbison states the question presented there as follows: "Whether a plaintiff who alleges intentional discrimination can survive summary judgment merely by questioning his employer's business judgment, without presenting any evidence, direct or indirect, that his employer's judgment was in fact motivated by an intent to discriminate." Brief for Petitioner, at i, Harbison-Walker Refactories v. Brieck, No. 87-271.

petition pending the resolution of Wards Cove Packing Co. v. Atonio, No. 87-1388, and Harbison-Walker Refractories v. Brieck, No. 87-271.

Respectfully submitted,



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September 1988

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH ROBINSON,
Plaintiff-Appellant,

v.

MICHAEL ADAMS, DIANNE R. COE, GEORGIA MCCARTHY, MARTIN MOSHIER, LURA SCOVIL, JOAN WILSON, COUNTY OF ORANGE, ORANGE COUNTY SUPERIOR COURT and L.B. UTTER,
Defendants-Appellees.

No. 85-6533

D.C. No. CV 83-6823-IH

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Irving Hill, District Judge, Presiding

Argued and Submitted
April 6, 1987—Pasadena, California

Filed October 13, 1987
Amended May 27, 1988

Before: J. Clifford Wallace, Mary M. Schroeder and Harry Pregerson, Circuit Judges.

Opinion by Judge Wallace; Dissent by Judge Pregerson

SUMMARY

Employment Discrimination

Appeal from a grant of summary judgment. Affirmed.

Appellant Robinson applied for four positions with the appellee County of Orange. Each application was denied at the screening phase. Robinson alleged a violation of Title VII, and the EEOC issued a right-to-sue letter. Robinson filed this action in district court alleging violations of section 1981 and Title VII. The district court entered summary judgment for all defendants.

[1] Under Title VII or under section 1981, a plaintiff must prove intentional discrimination to make out a discrimination claim using a disparate treatment theory. An employer cannot intentionally discriminate against a job applicant based on race unless the employer knows the applicant's race. [2] Robinson has not produced sufficient evidence on the question of the knowledge by Orange County or the employees of his race for a jury to return a verdict in his favor. [3] A plaintiff establishes a prima facie case of employment discrimination using a disparate impact theory when he or she shows that a business practice, neutral on its face, had a substantial, adverse impact on some group protected by Title VII. [4] Robinson fails to establish that general population statistics represent a pool of prospective applicants qualified for the jobs for which he applied.

The dissent argues that the district court erred in granting summary judgment on the disparate treatment claim because there is a genuine issue of material fact whether the Orange County employees reviewing Robinson's application actually knew he was black and that he has raised a genuine issue of material fact on whether blacks and particularly black males are proportionally represented in the court's work force.

COUNSEL

Kenneth Robinson, Fullerton, California, in pro per, for the plaintiff-appellant.

Lynn Bouslog, Santa Ana, California, for the defendants-appellees.

ORDER

The majority opinion, published at 830 F.2d 128, is amended as follows. The language beginning with the sentence starting on line 4 in the right-hand column of page 131 to the sentence ending at line 27 before the citation is deleted and the following is substituted:

> Robinson, however, has presented insufficient evidence to suggest this is the case here. His showing that Black males are statistically underrepresented cannot, standing alone, show a racially discriminatory impact on Blacks as a whole. To make out a prima facie case of disparate impact on Black males, Robinson would also have to "identify specific employment practices or selection criteria" and "show the causal relationship between the identified practices and the impact."

The dissenting opinion, published at 830 F.2d 131, is amended as follows:

The heading "A. Statistical Background of Blacks and Black Males" in the left-hand column of page 133 is deleted.

The heading "B. Black Males as a Protected Class" in the left-hand column of page 134 is deleted.

The sentence "I flatly . . . Title VII." in the second full paragraph in the left-hand column of page 134 is deleted.

The sentence "I would . . . Title VII." and the following citation in the right-hand column of page 134 is deleted and

the following is substituted: "I would hold that the evidence presented by Robinson is sufficient to make out a prima facie case of disparate impact on black males."

The panel as constituted above has voted to deny the petition for rehearing. A majority of the panel has voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc. An active judge called for an en banc vote and a majority of the judges of the court has voted to reject the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

OPINION

WALLACE, Circuit Judge:

Robinson appeals pro se the district court's summary judgment against him on his employment discrimination claims. He contends (1) that he need not prove that defendants had knowledge of his race to sustain a claim of racial discrimination under 42 U.S.C. § 1981 or Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, (2) that a genuine issue exists whether the defendants were aware of his race, and (3) that he established a prima facie case of disparate impact. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

In July and August 1983, Robinson applied for four positions with the County of Orange and the Orange County Superior Court (Orange County). Orange County denied each

application at the initial screening phase. Robinson filed a charge with the Equal Employment Opportunity Commission, alleging a violation of Title VII, and the Commission issued a right-to-sue letter. Robinson filed this action in district court against Orange County and several of its employees (the employees) alleging violations of section 1981 and Title VII. The district court entered summary judgment for all defendants. We review the summary judgment de novo. *Lojek v. Thomas,* 716 F.2d 675, 677 (9th Cir. 1983). We address first Robinson's disparate treatment claim, and then his claim of disparate impact.

II

[1] Under Title VII or under section 1981, a plaintiff must prove intentional discrimination to make out a discrimination claim using a disparate treatment theory. *Gay v. Waiters' and Dairy Lunchmen's Union,* 694 F.2d 531, 537 (9th Cir. 1982) (*Gay*). An employer cannot intentionally discriminate against a job applicant based on race unless the employer knows the applicant's race. Robinson contends, however, that he may discharge his prima facie burden of production by offering proof of the four elements articulated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), and that *McDonnell Douglas* merely requires proof that he belongs to a racial minority. *See id.* at 802; *Gay,* 694 F.2d at 538 & n.5.

The *McDonnell Douglas* test, however, "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence . . . on the critical question of discrimination." *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577 (1978). The *McDonnell Douglas* test defines one method of proving a prima facie case of discrimination — proof from which a trier of fact can reasonably infer intentional discrimination. *See Gay,* 694 F.2d at 538. But the *McDonnell Douglas* elements would not rationally create this inference if, as here, a plaintiff offers proof

that he is Black, but there is no showing by direct or indirect evidence that the decision-maker knew this fact.

[2] Even accepting this requirement, however, Robinson contends that he can survive a motion for summary judgment because some evidence in the record suggests that Orange County and the employees could have discovered he is Black. On all four of Robinson's applications, he checked a box indicating his race. Nevertheless, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511 (1986) (citations omitted) (*Liberty Lobby*). We do not believe that Robinson has produced sufficient evidence on the question of the knowledge by Orange County or the employees of his race for a jury to return a verdict in his favor.

The following paragraph appeared at the top of that portion of the application which contained racial and other demographic information.

> Orange County is asking all applicants for positions to complete this form in order to comply with United States government equal employment opportunity requirements. *Information you provide will not be used in any way as part of the testing process.* This flap will not be duplicated or made available to hiring department. [sic] Data collected is used for statistical purposes and to measure the County's effectiveness of recruiting efforts.

(Emphasis in original.) Furthermore, this section of the application appeared on a flap that is described in the record variously as a "tear apart attachment," "inside detachable tab," "tear-off form," and "separate sheet [that was] detached for internal record keeping purposes." The record suggests that

either the flap was photocopied as part of the original application and then torn off before the application was sent to the application screener, or a copy of the application which did not show the flap was sent to the application screener, or the flap was folded so that it could not be viewed by the application screener. Since the data on the flap did not contain significant information for statistical purposes, such as the job applied for and the date of application, the employer must have retained a full copy of the application in its records. The key question here is whether the screeners knew the applicant's race. Orange County submitted affidavits from the application screeners who had rejected Robinson's job applications. All of these screeners declared that they were unaware of Robinson's race when they reviewed and rejected his applications. Although the credibility of the application screeners could be a triable issue, Robinson has produced no evidence that places their credibility in doubt. "[N]either a desire to cross-examine an affiant nor an unspecified hope of undermining his or her credibility suffices to avert summary judgment." *National Union Fire Insurance Co. v. Argonaut Insurance Co.*, 701 F.2d 95, 97 (9th Cir. 1983).

In light of this record, we conclude that there was no genuine dispute as to whether the application screeners were aware of Robinson's race. The applications stated that the demographic information would not be considered as part of the hiring process, and the information was contained on a flap purposefully designed so that it would not be seen by the application screeners. Significantly, Robinson does not point to any evidence tending to show that this procedure resulted in the disclosure of racial information to application screeners in his or any other case. The only evidence in the record, the affidavits of the application screeners, unequivocally suggests that the procedure worked. Robinson's evidence on this issue is "merely colorable" and is not "significantly probative." *Liberty Lobby*, 106 S. Ct. at 2511. Therefore, we hold that no genuine issue exists as to whether the application screeners were aware of his race. Summary judgment was

appropriate on Robinson's intentional discrimination theory.[1]

III

[3] A plaintiff establishes a prima facie case of employment discrimination using a disparate impact theory when he or she shows that a business practice, neutral on its face, had a substantial, adverse impact on some group protected by Title VII. *Gay*, 694 F.2d at 537. Such proof is usually accomplished by statistical evidence showing "that an employment practice selects members of a protected class in a proportion smaller than their percentage in the pool of actual applicants." *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482 (9th Cir. 1983).

[4] Robinson contends he established a prima facie case of discriminatory impact by citing statistics which allegedly show that the percentage of Blacks in Orange County and in

[1]The dissent correctly points out that the record before us includes copies of Robinson's four applications still containing the detachable tab on which Robinson's race is noted. There is nothing in the record to suggest that these copies are in fact the copies of the applications that the application screeners actually saw. The form itself, as we observed above, indicates that this portion of the application would not be "duplicated" or otherwise made available to the hiring department. The most reasonable inference from this statement is that the County generally keeps the original applications on file, and sends a duplicate copy to the screeners. Robinson has presented nothing more than his conclusory assertion, which he admits is an assumption, that the copy of the application form he received through the discovery process is the same as what was sent to the application screeners. The screeners all declared that they were unaware of Robinson's race—i.e., that they did not see the tab containing his race identification. In the absence of some evidence that the copies of the form Robinson procured through discovery are the same as those submitted to the application screeners, we are unable to believe that a jury could decide, based on the preponderance of the evidence, that Robinson's copy of the application was the same as what the screeners saw and therefore that the screeners were aware of his race. *See Liberty Lobby*, 106 S. Ct. at 2510-12. Thus, in light of the screener's testimony, there is no triable issue of fact.

surrounding counties is higher than the percentage of Blacks employed by Orange County. Nevertheless, Robinson fails to establish that these general population statistics represent a pool of prospective applicants qualified for the jobs for which he applied. We have consistently rejected the usefulness of general population statistics as a proxy for the pool of potential applicants where the employer sought applicants for positions requiring special skills. *See id.* at 482-83.

In any case, the most probative statistics in the record tend to show an absence of disparate impact: in 1984, although Blacks represented 1.2% of the Orange County population, 1.7% of the Superior Court work force was Black and 2.7% of both the "Professional" and "Official/Administration" positions in the County of Orange were held by Blacks. Robinson argues, however, that his disparate impact theory can survive a motion for summary judgment because he has presented evidence that the Orange County Superior Court did not have any Black *male* employees. Obviously, since Blacks are not statistically underrepresented in the Orange County Superior Court's work force, Robinson cannot plausibly maintain that the Court's hiring practices have a racially discriminatory impact on Blacks as a whole. Conceivably, the absence of any Black *male* employees could result from racial stereotyping or have some other link to racial discrimination. Robinson, however, has presented insufficient evidence to suggest this is the case here. His showing that Black males are statistically underrepresented cannot, standing alone, show a racially discriminatory impact on Blacks as a whole. To make out a prima facie case of disparate impact on Black males, Robinson would also have to "identify specific employment practices or selection criteria" and "show the causal relationship between the identified practices and the impact." *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1482 (9th Cir. 1987) (en banc). This, we conclude, he has not done to the degree necessary to survive a motion for summary judgment.

Because Robinson has not pointed to evidence creating a genuine dispute about facts material to a prima facie case of

disparate impact, summary judgment was appropriate on this issue.

AFFIRMED.

PREGERSON, J., dissenting

Kenneth Robinson appeals pro se from the district court's grant of summary judgment in favor of defendants. In the summer of 1983, Robinson applied for four separate jobs with the Orange County Superior Court. As part of the job application, Robinson filled out a demographic questionnaire in which he indicated that he is black. This questionnaire is a "tear-off attachment" to the job application and states at the top that the information provided on it will be used for statistical purposes only. Robinson was not hired for any of the four positions, and he brought this suit alleging that he was denied employment with the Orange County Superior Court based on his race. The magistrate who first heard the case recommended that the district court grant summary judgment for defendants on the Title VII "disparate treatment" claim but deny summary judgment on the "disparate impact" claim. The district court partially accepted this recommendation, granting summary judgment for defendants on both claims.

We review de novo district court orders granting summary judgment. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986). Our review is governed by the same standard used by the district court under Fed. R. Civ. P. 56(c). *Id.* We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986).

Title VII is "a remedial statute to be liberally construed in favor of the victims of discrimination." *Mahroom v. Hook*, 563 F.2d 1369, 1375 (9th Cir. 1977), *cert. denied*, 436 U.S. 904 (1978). Particularly where, as here, a layperson brings a Title VII action pro se, a liberal construction of the statute's technical requirements is appropriate. *Rice v. Hamilton Air Force Base Commissary*, 720 F.2d 1082, 1084 (9th Cir. 1983).

I. *Disparate Treatment*

As the majority states, under Title VII or section 1981 a plaintiff must establish intentional discrimination to show disparate treatment. I agree with the majority that, notwithstanding the literal language of *McDonnell Douglas*, a finding of intentional discrimination logically requires a showing that defendants knew plaintiff's race. In this case, then, to pursue a claim of disparate treatment, Robinson must prove that Orange County Superior Court employees knew he was black when they considered his applications for employment. I would hold that the district court erred in granting summary judgment on the disparate treatment claim because there is a genuine issue of material fact whether the Orange County employees reviewing Robinson's application actually knew he was black.

In support of its conclusion that there is no genuine factual issue on this point, the majority cites (1) the language at the top of the demographic questionnaire attached to the employment application stating that racial and other information would not be considered in the employment decision, (2) the fact that the questionnaire appeared on a detachable flap that was part of the application form, and (3) affidavit testimony by County employees who reviewed Robinson's applications indicating that when they decided not to hire Robinson they were unaware of his race.

The majority neglects to mention the evidence Robinson provided to counter the evidence provided by the County. In

his Excerpts of Record, Robinson provided copies of his employment applications received from the County via the discovery process. On the pages in the Excerpt marked 141, 150, 163, and 279, Robinson's applications are reproduced. In each case, the demographic questionnaire, complete with Robinson's "x" indicating that he is black, is still attached to the application. In my view, this evidence indicates that the County employees who considered Robinson's application may have known he was black.

The evidence provided by the County does not undermine the probity of the raw fact that Robinson's racial information was still attached to his job application. The first two items cited by the majority are of negligible value for determining what the reviewing employees actually knew. The language at the top of the questionnaire is not determinative of how applications were in fact processed. Similarly, the fact that the applicant's racial information was provided on a detachable form indicates little about the County's treatment of race in the job application process. If the County had an entirely separate demographic questionnaire used for gathering statistics, it might demonstrate the County's desire to ensure that employees reviewing the applications would be ignorant of each applicant's race. But by keeping this information physically attached to other employment information, the County runs a risk that employees making employment decisions will be aware of racial and other demographic factors that might lead to discrimination.

The County employees' affidavits indicating that they were unaware of Robinson's race is the only viable evidence the County has provided to dispute Robinson's allegation that the employees knew of his race. As the majority recognizes, the credibility of these employees is a matter for the trier of fact. Although the credibility issue alone probably should not defeat defendants' summary judgment motion, the credibility question coupled with Robinson's concrete evidence that the employees may have known of his race is sufficient to

allow his disparate treatment claim to withstand summary judgment.

II. *Disparate Impact*

Robinson also brought a Title VII claim under the disparate impact theory. The district court rejected the magistrate's recommendation that defendants' summary judgment motion on this claim be rejected. I would reverse the district court's grant of summary judgment on this issue.

Under a disparate impact approach, an employee must show that facially neutral employment practices have a "significantly discriminatory" impact upon a group protected by Title VII. *Connecticut v. Teal*, 457 U.S. 440, 446 (1982). The starting point for disparate impact analysis is identifying the appropriate candidate pool and its racial makeup. *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482 (9th Cir. 1983). Generally, the most appropriate statistical base is the actual pool of applicants. *Id.*

Robinson has shown that the Orange County Superior Court has *no* black male employees, and that the overall representation of blacks (all women) among its employees is 1.7%. The majority states that there is no statistical support for Robinson's assertion that blacks are underrepresented in the court's work force. To the contrary, I believe that Robinson has raised a genuine issue of material fact on whether blacks and particularly black males are proportionally represented in the court's work force.

Defendants maintain that their 1.7% rate of black employment is more than sufficient, in light of the fact that blacks constitute only 1.2% of Orange County's population. The County has proferred no justification for its reliance on general population statistics rather than on statistics concerning the actual pool of applicants for the positions for which Robinson applied. Given the startlingly low levels of black

employment in the Orange County Superior Court, I would hold that the absence of statistics about the candidate pool by itself justifies reversing the grant of summary judgment for defendants.

Even assuming that general population statistics are appropriate, it is not at all clear under *Hazelwood School Dist. v. United States,* 433 U.S. 299, 313 (1977), that the Orange County population is the "relevant labor market" required for statistical comparisons in disparate impact cases. Orange County is not an isolated community. Although the United States census bureau identifies Orange County as a Standard Metropolitan Statistical Area, the bureau also identifies Orange County as part of the Los Angeles-Long Beach-Anaheim standard consolidated statistical area. Being part of the greater Los Angeles metropolitan area, Orange County presumably draws its work force from a larger population pool than the County alone. The evidence adduced thus far supports this presumption. For example, Orange County advertised the positions for which Robinson applied in the Los Angeles Times and the Orange County Register, both of which are widely circulated throughout the greater Los Angeles area.

I would hold, in keeping with *Hazelwood,* that this case should go back to the district court "for further findings as to the relevant labor market." *Id.*

Robinson contends that even if there were factual support for defendants' argument that *blacks* are proportionately represented in the court's work force, the evidence nonetheless demonstrates disparate impact on *black males.* The Supreme Court stated in *Connecticut v. Teal,* 457 U.S. 440, 451, 455 (1982):

> Title VII strives to achieve equality of opportunity by rooting out "artificial, arbitrary, and unnecessary" employer-created barriers to professional

development that have a discriminatory impact upon individuals.

. . .

It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group. We recognized in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978), that fairness to the class of women employees as a whole could not justify unfairness to the individual female employee because the "statute's focus on the individual is unambiguous." *Id.* at 1375. . . .

The stark fact is that the Orange County Superior Court does not employ a single black male. This is strong evidence that defendants have discriminated against black males by creating an artificial barrier to their professional development, thereby frustrating Title VII's goals of achieving equality of opportunity. Like the behavior in *Manhart*, the Orange County Superior Court's failure to employ a single black male blatantly disregards the rights of the individual recognized and protected in Title VII. I would hold that the evidence presented by Robinson is sufficient to make out a prima facie case of disparate impact on black males. *Cf. Jefferies v. Harris County Community Action Ass'n*, 614 F.2d 1025, 1032-35 (9th Cir. 1980) (black females are a protected class under Title VII). Accordingly, I dissent from the majority's view to the contrary.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 83-6823-IH(Mc)
Filed October 31, 1985

KENNETH ROBINSON,

Plaintiff,

vs.

MICHAEL ADAMS, et al.,

Defendants

FINAL JUDGMENT

Pursuant to a document entitled "Memorandum and Order" filed this date and the Order appearing at the end thereof, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Plaintiff shall take nothing by his action against any of the Defendants named herein. The Defendants and each of them shall have judgment against the

Plaintiff with costs of $ _____.

2. The Clerk shall transmit a copy of the said "Memorandum and Order" and this judgment to all counsel of record and to Magistrate McMahon.

DATED: October 31, 1985.

s/s
IRVING HILL, Judge
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 83-6823-IH(Mc)
Filed October 31, 1985

KENNETH ROBINSON,

Plaintiff,

vs.

MICHAEL ADAMS, DIANNE R. COE, GEORGIA McCARTHY, MARTIN MOSHIER, LURA SCOVIL, JOAN WILSON, BEN AVILLAR, MARIA BASTANCHURY, COUNTY OF ORANGE, A MUNICIPAL CALIFORNIA CORPORATION, SUPERIOR COURT OF ORANGE, AND L. B. UTTER,

Defendants.

MEMORANDUM AND ORDER

The pro se plaintiff has filed an employment discrimination complaint alleging that the defendants discriminated against the plaintiff by failing to hire the plaintiff for certain jobs with the County of Orange because of the plaintiff's race. The court has previ-

ously granted partial summary judgment against the plaintiff in favor of the defendants on all of the plaintiff's claims asserted under 42 U.S.C. § 1981. (See Partial Report and Recommendation of United States Magistrate, filed February 14, 1985.) The defendants have now moved for summary judgment on all of the plaintiff's claims asserted under Title VII of the Civil Rights Act of 1964. (42 U.S.C. §200e[sic]-2000e-17.)

This court has now received the Second Partial Report and Recommendation of United States Magistrate, filed August 13, 1985. In that Second Partial Report and Recommendation, the Magistrate recommends that the court:

(1) Grant partial summary judgment for the defendants dismissing all of the plaintiff's Title VII disparate treatment claims

as against all defendants;

(2) Deny summary judgment for the defendants on the plaintiff's disparate impact claims;

(3) Dismiss all punitive damage claims as against all defendants;

(4) Dismiss all back pay claims as against all defendants other than the defendant County of Orange; and

5) Dismiss the complaint entirely as against defendants Bastanchury and Avillar.

The Magistrate has also recommended that this action proceed to trial as to the plaintiff's Title VII disparate impact claims seeking back pay as against defendant County of Orange and injunctive relief as against all defendants other than Bastanchury and Avillar.

The court has reviewed the complaint, all of the records and files herein, the Second Partial Report and Recommendation of United States Magistrate, and the Plaintiff's Objections to the Report and Recommendation. The court approves and adopts the findings, conclusions, and recommendations of the Magistrate in the Second Partial Report and Recommendation insofar as they relate to the recommendations numbered (1), (3), (4), and (5), above. The court, however, does not adopt the Magistrate's recommendation regarding the plaintiff's disparate impact claims. The court finds that the plaintiff has not presented evidence sufficient to demonstrate the existence of a viable Title VII disparate impact claim. The court, therefore, grants summary judgment for the defendants and against the plaintiff on the

Title VII disparate impact claim.

The Magistrate has, in his Second Partial Report and Recommendation, outlined the applicable Title VII disparate impact law and its application to this particular action. The court adopts the Magistrate's analysis with some modifications. (Additions are indicated by passages set off in brackets and omissions are set off by ellipsis.)

H. Disparate Impact

A plaintiff seeking to establish a prima facie case of employment discrimination on a disparate impact theory must show that a facially neutral employment practice had a significantly discriminatory impact. Once that showing has been made by the plaintiff, the employer must demonstrate that the challenged

employment practice has a manifest relationship to the employment in question in order to avoid a finding of discrimination. If the employer demonstrates that the challenged employment practice has a manifest relationship to the employment, a plaintiff may still prevail by showing that the employer was using the challenged practice as a mere pretext for discrimination. Connecticut v. Teal, 457 U.S. 440, 446-447, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982) discussing Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

Of necessity, disparate impact cases rely heavily upon statistics. Typically, the plaintiff identifies a particular employment practice, e.g., a requirement that an appli-

cant seeking a particular position possess a high school diploma or pass a certain test (See Griggs, supra) or a requirement that an applicant be of a certain height or weight. (See Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977).) The plaintiff then attempts to show through a statistical analysis that the facially neutral practice has the effect of eliminating a disproportionate share of applicants of a protected class. Thus, in Dothard, supra, Alabama's requirement that prison guards be at least 5'2" and weigh at least 120 pounds excluded over 41 percent of the female population but less than 1 percent of the male population. This statistical evidence was held to

constitute a prima facie case of sex discrimination. Id., pages 330-331.

I. The Plaintiff's Applications--Disparate Impact

The plaintiff has not clearly identified any particular employment practice of the defendant County of Orange which had an adverse impact upon members of his protected class, black males or black males over age 40. The plaintiff's points and authorities attempt to identify certain practices including "(1) discounting education over experience; (2) the underrepresentation of blacks in their workforce; and (3) not permitting testing for those persons of a protected class who meet minimum qualifications". (Plaintiff's Answer to Defendants' Motion, etc., filed May 21, 1985,

pages 23-24.) In oral argument, the plaintiff identified [an additional] ... challenged employment practice ... the use of subjective judgment by persons who screen applications to determine if a given applicant meets minimum stated qualifications. [See Transcript of June 4, 1985, of Oral Argument on Summary Judgment Motion, pages 28-29.]

At least one of these alleged "employment practices" is not a practice at all in the sense that the term is used in Griggs, supra. Underrepresentation of blacks is a possible result of an employment practice, not an employment practice itself. The plaintiff has only vaguely identified the parameters of the other three challenged employment practices.

The plaintiff has offered virtually no statistical evidence designed to show that the use of the identified employment practices adversely affect black males or black males over age 40. Thus, the plaintiff has not presented any statistical evidence showing or tending to show that a challenged employment practice has a disproportionate impact upon black male job applicants. The only vaguely pertinent statistic which the plaintiff has offered is the fact that the Orange County Superior Court employed no black males as of April, 1984. (Plaintiff's Answer to Defendants' Motion, etc., filed May 21, 1985, Exhibit 11, p. 247.) This statistic does not, in and of itself, demonstrate that an iden-

> tified employment practice discriminates against black males.

(Second Partial Report and Recommendation of United States Magistrate, filed August 13, 1985, page 15, line 25, through page 18, line 2.)

Pursuant to Rule 56(c), F.R.Civ.P., a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". In this Circuit, it is the law that when

> "it is clear from the evidence presented at the hearing on the motion for summary judgment that the movant would be entitled to a directed verdict

> were the case to proceed to trial, the motion may properly be granted, unless the opposing party is able to offer adequate reasons why he is presently unable to present facts justifying his opposition."

Neely v. St. Paul Fire And Marine Insurance Company, 584 F.2d 341, 344 (9th Cir. 1978); Ruffin v. County Of Los Angeles, 607 F.2d 1276, 1280 (9th Cir. 1979), cert. denied, 455 U.S. 951 (1980).

It is apparent that, if the evidence presented in the present case at the summary judgment motion were considered at trial by the court at a defendants' motion for a directed verdict, the defendants would be entitled to a directed verdict. The plaintiff has identified three employment practices which might arguably have an adverse

impact upon his protected class, black males, or black males over age 40:

(1) discounting education over experience;

(2) not permitting testing for those persons of a protected class who meet minimum qualifications; and

(3) the use of subjective judgment by those who screen job applications to determine if a job applicant meets minimum stated qualification.

These challenged employment practices are only vaguely described. Nowhere does the plaintiff define the exact parameters of the challenged practice. Moreover, the plaintiff has not offered any statistics which show or tend to show that the challenged employment practices disproportionately exclude black male job

applicants.

Thus, the plaintiff did not attempt to show at the summary judgment hearing how many applicants applied for each of the jobs in issue in this case, how many of these applicants were black males, how many of the black male applicants were exclude by the challenged employment practice, and whether the number of black males excluded from the applicant pool by the use of the challenged employment practice was disproportionate to the number of other applicants excluded by use of the employment practice. The plaintiff must be able to make a showing of this type in order to demonstrate the existence of a prima facie case that a "facially neutral employment practice had a significantly discriminatory impact". Connecticut v. Teal, supra, page 446.

The court notes that the pro se plaintiff is a law school graduate who may fairly be expected to be able to read and to understand the leading cases concerning Title VII disparate treatment actions. He may also fairly be expected to understand the nature of the evidence necessary to establish the existence of a prima facie case. The plaintiff was not able to demonstrate the existence of a prima facie case at the summary judgment motion. He has not offered any reason why he cannot present facts to the court demonstrating the existence of a prima facie case.

There does not appear to be any genuine issue as to any material fact in the present action. The defendants are entitled to judgment as a matter of law on all of the plaintiff's Title VII disparate impact claims.

ORDER

For the reasons stated by the Magistrate in those portions of his recommendations which the court has specifically adopted in this Memorandum and Order and for the reasons stated in this Memorandum and Order,

IT IS HEREBY ORDERED that summary judgment be entered in favor of the defendants and against the plaintiff as to all claims for relief stated in the First Amended Complaint.

DATED: this 31 day of October, 1985.

s/s
IRVING HILL
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 83-6823-IH(Mc)
Filed August 31 1985

KENNETH ROBINSON,

Plaintiff,

vs.

MICHAEL ADAMS, DIANNE R. COE, GEORGIA McCARTHY, MARTIN MOSHIER, LURA SCOVIL, JOAN WILSON, BEN AVILLAR, MARIA BASTANCHURY, COUNTY OF ORANGE, A MUNICIPAL CALIFORNIA CORPORATION, SUPERIOR COURT OF ORANGE, AND L. B. UTTER,

Defendants

SECOND PARTIAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This Report and Recommendation is filed pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and General Order No. 194 of the United States District Court for the Central District of California.

The pro se plaintiff has filed an employment discrimination complaint alleging that the defendants discriminated against the plaintiff by failing to hire the plaintiff for certain jobs with the County of Orange because of the plaintiff's race. The court has previously granted partial summary judgment against the plaintiff in favor of the defendants on all of the plaintiff's claims asserted under 42 U.S.C. § 1981. (See Partial Report and Recommendation of United States Magistrate, filed February 14, 1985.) The defendants have now moved for summary judgment on all of the plaintiff's claims asserted under Title VII of the Civil Rights Act of 1964. (42 U.S.C. § 200e[sic]-2000e-17.) The Magistrate recommends that the court grant partial summary judgment in favor of the defendants against the plaintiff

on the plaintiff's Title VII disparate treatment claims, and further recommends that the court deny summary judgment on the plaintiff's Title VII disparate impact claims.

The plaintiff is a black male over age 40 who applied for four separate jobs with the County of Orange in the summer of 1983. The defendants are the County of Orange, the Superior Court of the County of Orange (the employer for one of the positions, Probate Examiner I), and certain individual employees of the County of Orange who processed the plaintiff's various job applications, who denied the plaintiff's administrative complaints concerning alleged employment discrimination, or who were employed in the County of Orange affirmative action program.

The plaintiff's First Amended/Supplemental Complaint (filed August 21, 1984) invokes the jurisdiction of the court pursuant to 28 U.S.C. §§ 1337 and 1343(4) (sic) and pursuant to 42 U.S.C. § 2000e-5(f)(3). The First Amended Complaint states claims for relief under 42 U.S.C. § 1981 and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17. The First Amended Complaint alleges that the plaintiff applied for four separate jobs with the County of Orange - Administrative Analyst III, Employment Services Representative IV, Investigator-Social Services, and Probate examiner I, that the plaintiff met the minimum qualifications for the jobs, but that the plaintiff was denied the jobs because of his race. As relief, the complaint requests back pay, punitive damages totalling one million dollars,

attorney's fees, and injunctive relief. The defendants' answer denies any acts of discrimination and asserts various affirmative defenses.

DISCUSSION

A. Summary Judgment

A court must enter summary judgment in favor of a party if the pleadings and the evidence submitted in support of the motion "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". (Rule 56(c), F.R.Civ.P.) If the court is unable to render summary judgment upon the whole case the court may enter a partial summary judgment or enter an order "specifying the facts that appear without substantial controversy...". Rule 56(d), F.R.Civ.P.

B. Title VII Of The Civil Rights Act Of 1964

The plaintiff's complaint alleges that the County of Orange failed to hire him in the four positions for which he applied because he is black. He further alleges that the County hired persons less qualified than the plaintiff in other positions for which the plaintiff applied. Title VII of the Civil Rights Act forbids discriminatory employment practices:

> It shall be an unlawful employment practice for an employer ---
>
> (1) to fail or refuse to hire ... any individual ... because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in

> any way which would deprive or tend to deprive any individual of employment opportunities ... because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a).

A claim under Title VII of employment discrimination because of race may arise in two different ways. An individual may allege that he has been subjected to 'disparate treatment' because of his race, or that he has been the victim of a facially neutral practice having a 'disparate impact' on his racial group." Furnco Construction Corporation v. Waters, 438 U.S. 567, 582, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978) (Marshall, J., concurring in part). The plaintiff has attempted to prosecute his lawsuit using both disparate treatment and

disparate impact theories.

C. Disparate Treatment

A Title VII claim prosecuted under a disparate treatment theory requires proof of intentional employment discrimination. Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30, 694 F.2d 531, 537 (9th Cir. 1982). A plaintiff establishes a prima facie case of employment discrimination on account of race through disparate treatment by showing:

(1) that the plaintiff belongs to a racial minority;

(2) that the plaintiff applied and was qualified for a job for which the employer was seeking applicants;

(3) that, despite the plaintiff's qualifications, the plaintiff was rejected; and

(4) that after the plaintiff's

> rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 729, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). A plaintiff may also establish a prima facie case of intentional discrimination by other modes of proof which support an inference of discrimination. Gay supra, p. 538.

A court may grant summary judgment against a plaintiff claiming disparate treatment under Title VII when the plaintiff's employment application was rejected because the application did not contain information establishing that the plaintiff possessed the specific qualifications sought by the employer in a job announcement. Taqupa v. Board Of

Directors, 633 F.2d 1309, 1311-1312 (9th Cir. 1980). A job applicant who files an application which does not establish that he possesses the required qualifications is deemed to have failed to apply for the position within the meaning of the guidelines laid down in McDonnell Douglas v. Green. Tagupa, supra, p. 1311.

The standard of review of disparate treatment claims and of claims of intentional job discrimination under 42 U.S.C. § 1981 are very similar. The following analysis of the plaintiff's disparate treatment claims closely tracks the analysis of the plaintiff's § 1981 claims in the Partial Report and Recommendation of United States Magistrate, filed February 14, 1985.

D. Administrative Analyst III--Disparate Treatment

1. Job Prerequisites

The job announcement for the position of Administrative Analyst III required applicants to possess three years of experience. The announcement listed as a prerequisite "[t]hree years of experience that requires the application of the knowledges (sic) and abilities listed as minimum qualifications; education can be substituted for up to one year at the rate of three semester units for one month of experience...". (Defendants' Index of Exhibits (filed August 17, 1984) hereinafter cited as "Defendants' Index", Exhibit 2, p. 14). The knowledge and abilities generally listed as qualifications included administrative skills such as those needed to gather information, prepare reports, administer and evaluate pro-

grams, prepare budgets, develop plans, prepare organizational charts, etc. Id., pages 14-15. In context, it is clear that there was a requirement that job applicants have three years of administrative experience or two years of administrative experience plus an educational substitute equivalent to one year of experience.

2. Plaintiff's Application

The plaintiff's application lists two jobs which could arguably demonstrate administrative experience, a position as an assistant registrar at a college for which the plaintiff worked two years and nine months, and a position as a manager for an export/import company. The plaintiff's application did not state whether these former jobs were full or part time and did not state the number of hours worked per week at each job. Id.,

Exhibit 1, p. 5.

3. The Selection Process

Defendant Joan Wilson, who is employed as a Senior Administrative Analyst for the County of Orange, processed the applications for the Administrative Analyst III job. Defendant Wilson screened the plaintiff's application and rejected it because the application contained insufficient information to establish that the plaintiff met the minimum requirements. (Defendants' Memorandum of Points and Authorities in Support of Motion for Summary Judgment, filed August 17, 1984, Declaration of Joan Wilson, paragraph 5). In particular, the plaintiff's application failed to state whether his jobs as assistant registrar and manager of an export/import company were full-time or part-time jobs and failed to state the

hours per week. This made it impossible to determine whether the plaintiff had the minimum required three years experience (Id., paragraph 7).

The plaintiff has offered no evidence which shows or tends to show that his application demonstrated that the plaintiff met the minimum qualification standard.

Clarence Ray, a white male applicant for the Administrative Analyst III position, also failed explicitly to state whether his previous work experience was in full-time or part-time positions and failed to state the hours he worked per week in previous jobs. (Plaintiff's Answer to Defendants' Motion For Summary Judgment, etc., filed May 21, 1985, Exhibit 1, p. 32.) Clarence Ray's application was apparently not rejected at the screening process (Id., p. 8).

Joan Wilson was not aware of the plaintiff's race during the screening phase. Information regarding the plaintiff's race, age, and sex was available on a tear-apart attachment to the plaintiff's employment application. Joan Wilson did not review this information on any application during the screening phase in which the petitioner's application was rejected. (Defendants' Memorandum, etc., filed August 17, 1984, Declaration of Joan Wilson, paragraphs 3 and 4.)

4. Magistrate's Discussion

The defendants have demonstrated that the plaintiff's employment application for the position of Administrative Analyst III did not contain information establishing that the plaintiff possessed the minimum qualifications sought by the employer in the job announcement. The

plaintiff has offered no evidence which shows or tends to show otherwise. Under the rule of Tagupa, supra, the plaintiff is deemed to have failed to have applied for the position within the meaning of McDonnell v. Green test.

The plaintiff cannot sustain a claim of disparate treatment based upon the fact that his application was rejected while Clarence Ray's application was not. The only evidence before the court with respect to the screening process conducted by Joan Wilson is that she was not aware of the plaintiff's race during the screening process. It is impossible for a person screening employment applications intentionally to discriminate against a job applicant because of the applicant's race, if the screener is not aware of the applicant's race.

The plaintiff contends in his Answer to Defendants' Motion For Summary Judgment, filed May 21, 1985 (a document apparently intended to fulfill the requirement of a Statement of Genuine Issues under Local Rule 7.14.2) that defendant Wilson knew or should have known of plaintiff's race or sex. (See Answer to Defendants' Motion, etc., pages 1-2.) The plaintiff has not supplied any evidence in support of this assertion. The plaintiff's assertion does not rebut the evidence offered by the defendants in the Declaration of Joan Wilson. The assertion of plaintiff does not create a triable issue of fact.

The court should grant summary judgment for the defendants as to the plaintiff's Title VII disparate treatment claim relating to the position of Administrative Analyst III.

E. Employment Services Representative IV--Disparate Treatment

1. Job Prerequisites

The job announcement for the position of Employment Services Representative IV provides for the following prerequisites: "Education/Experience: One year of experience performing the duties of an Employment Services Representative II or six months as an Employment Services Representative III or equivalent experience that demonstrates possession of the knowledges (sic) and abilities listed above" (Defendants' Index, Exhibit i, p. 48). The knowledge and abilities listed in the announcement generally describe skills needed to fulfill the role of a vocational counselor. The announcement specifically requires knowledge of the laws, regulations, and administrative guidelines which affect the Comprehensive Employment

and Training Act (CETA) and other special employment programs. (Id., pps. 47-48.)

2. Plaintiff's Application

The plaintiff's application for the position of Employment Services Representative IV states that the plaintiff worked as a full-time assistant registrar at a college. The plaintiff stated that part of this job involved academic counseling of students. The plaintiff also stated that, as part of a course in vocational counseling, he had counseled various individuals to help them identify their vocational interests. (Defendants' Index, Exhibit 7, p. 43.) The plaintiff also stated that he had participated in a CETA program and studied the law regarding affirmative action and employment discrimination. (Id., p. 44.)

3. The Selection Process

Defendant Georgia McCarthy, a

personnel specialist with the County of Orange, processed the plaintiff's application for the Employment Services Representative IV job. Defendant McCarthy screened the plaintiff's application and rejected it because the application did not show that the plaintiff had the required experience and because the information in the application did not contain enough specific information which demonstrated that the plaintiff possessed the required experience (Defendants' Memorandum, Declaration of Georgia McCarthy, paragraph 5).

In an answer to an interrogatory, the defendants stated that the plaintiff's application was rejected because the plaintiff's description of counseling activity in his job as assistant registrar did not state the amount of time

allotted to this activity. The activity was not "vocational" counseling. The plaintiff's vocational counseling activity undertaken as part of a course requirement did not constitute qualifying experience because the job requirements did not contain an educational substitute for experience. The fact that the plaintiff worked in a CETA program did not constitute experience working with CETA and federal and state regulations pertaining to employment. The plaintiff's application failed to state the percentages of his time spent on employee training and counseling. The application thus contained insufficient information to evaluate the plaintiff's qualifications (Defendants' Index, Exhibit pps. 23-24.)

The plaintiff has offered no evidence which shows or tends to show

that his application contained the required experience. The plaintiff claims that the defendants hired an applicant less qualified than the plaintiff. (Plaintiff's Answer to Defendants' Motion, etc., filed May 21, 1985, p. 3.) He has apparently offered no evidence in support of that conclusion.

4. Magistrate's Discussion

The plaintiff's application for Employment Services Representative IV did not contain information which established that the plaintiff had one year of experience performing the duties of Employment Services Representative II or six months of experience as an Employment Services Representative III or some other equivalent experience. The plaintiff apparently does not contend otherwise.

The evidence demonstrates that the

plaintiff's employment application did not contain information demonstrating that the plaintiff possessed the minimum qualifications sought by the employer. The plaintiff is deemed to have failed to apply for the position within the meaning of the McDonnell Douglas v. Green test. Tagupa, supra. The court should grant summary judgment for the defendants as to the Title VII disparate treatment claim relating to the position of Employment Services Representative IV.

F. Investigator, Social Services--Disparate Treatment

1. Job Prerequisites

The job announcement for the position of Investigator, Social Services provides for the following prerequisites:

> One year of experience as an Investigator Trainee, SSA, with Orange County, or one year experience at the fully qualified

working level as a welfare fraud investigator in California welfare department, or two years of criminal investigative work which demonstrates the application or development of the required knowledges and abilities listed above as minimum qualifications.

(Defendants' Index, Exhibit 13, p. 71).

2. Plaintiff's Application

The plaintiff's application for the position of Investigator, Social Services, contains no information indicating that the plaintiff had any work experience as a criminal investigator or investigator trainee. The application states that the plaintiff took a law school class entitled "Investigative Techniques". The application also states that the plaintiff has a law degree, a J.D. from Western State University.

(Defendants' Index, Exhibit 12, pages 59 and 65.)

3. The Selection Process

Defendant Diane Coe, a personnel specialist with the County of Orange, processed the plaintiff's application for the position of Investigator, Social Services. Defendant Coe screened the plaintiff's application and rejected it because the application did not demonstrate that the plaintiff possessed the required work experience as a criminal investigator. (Defendants' Memorandum, Declaration of Diane Coe, paragraphs 5 and 7.) The plaintiff has offered no evidence showing or tending to show that his application demonstrated that he possessed the required criminal investigative experience.

4. Magistrate's Discussion

G. Probate Examiner I--Disparate Treatment

The plaintiff's application for Investigator, Social Services, did not contain information which established that the plaintiff had the required experience as a criminal investigator. The only evidence before the court is that the application was rejected because the plaintiff did not qualify for the position. The plaintiff is deemed to have failed to apply for the position within the meaning of the McDonnell Douglas v. Green, test. Tagupa, supra. The court should grant summary judgment for the defendants as to the Title VII disparate treatment claim relating to the position of Investigator, Social Services.

1. Job Prerequisites

The job announcement for the

position of Probate examiner I sought candidates with some experience and/or education relating to the functions, purposes and procedures of probate law.

2. Plaintiff's Application

The plaintiff's application for the position of Probate Examiner I states that the plaintiff had completed law school and attained a J.D. degree. While in law school, the plaintiff had taken a course in Wills and a course in Civil Procedure. (Defendants' Index, Exhibit 17, pages 77-78.)

3. The Selection Process

Defendant Lura Scoville is employed as a Probate Coordinator with the Orange County Superior Court. She processed 97 applications for the position of Probate Examiner I, including the plaintiff's application. Defendant Scoville screened all the applications and rejected the

plaintiff's application at the initial screening phase because he was not deemed to be one of the most qualified applicants. She found that the plaintiff was not one of the most qualified applicants because the plaintiff's application did not contain any information which showed that the plaintiff had any previous job experience or any other experience in the probate field. The plaintiff's courses at law school did not reflect actual procedural practicing of the items of law and administration required before the Probate Court. Other job candidates had law degrees and relevant experience. The plaintiff, therefore, was not one of the most qualified applicants. (Defendants' Memorandum, Declaration of Lura Scoville, paragraphs 4 and 6.)

Defendant Scoville states in her

declaration that she was not aware of the plaintiff's race at any time during the screening process. "The applications originally submitted to personnel by plaintiff may have contained a separate sheet indicating background information such as race, that sheet was detached for internal record keeping purposes and was not included in the application this declarant [Scoville] reviewed." (Id., paragraph 7.)

The plaintiff contends that defendant Scoville knew or should have known of the plaintiff's race and sex. (Plaintiff's Answer to Defendants' Motion, filed May 21, 1985, p. 4.) He has offered no evidence in support of this assertion.

4. Magistrate's Discussion

The only evidence contained in the documents presented to the court in

support of and in opposition to the Defendants' Motion For Summary Judgment is the testimony of defendant Scoville that she was not aware of the plaintiff's race at any time during the screening process and that the information in the application concerning the plaintiff's race was not included in the application of the plaintiff which she reviewed. It is impossible for a person screening employment applications intentionally to discriminate against a job applicant because of the applicant's race, if the screener is not aware of the applicant's race.

Nothing that the plaintiff has presented to the court rebuts the declaration of defendant Scoville. The plaintiff's bare assertion that defendant Scoville knew of his race at the time she screened his application does not create

a triable issue of fact.

The court should grant summary judgment for the defendants as to the plaintiff's Title VII disparate treatment claim relating to the position of Probate Examiner I. In summary, the court should grant summary judgment for the defendants on all of the plaintiff's Title VII disparate treatment claims.

H. Disparate Impact

A plaintiff seeking to establish a prima facie case of employment discrimination on a disparate impact theory must show that a facially neutral employment practice had a significantly discriminatory impact. Once that showing has been made by the plaintiff, the employer must demonstrate that the challenged employment practice has a manifest relationship to the employment in question in order to avoid a finding

of discrimination. If the employer demonstrates that the challenged employment practice has a manifest relationship to the employment, a plaintiff may still prevail by showing that the employer was using the challenged practice as a mere pretext for discrimination. Connecticut v. Teal, 457 U.S. 440, 446-447, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982) discussing Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

Of necessity, disparate impact cases rely heavily upon statistics. Typically, the plaintiff identifies a particular employment practice, e.g., a requirement that an applicant seeking a particular position possess a high school diploma or pass a certain test (See Griggs, supra) or a requirement that an applicant be of a certain height or weight. (See Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct.

2720, 53 L.Ed.2d 786 (1977).) The plaintiff then attempts to show through a statistical analysis that the facially neutral practice has the effect of eliminating a disproportionate share of applicants of a protected class. Thus, in Dothard, supra, Alabama's requirement that prison guards be at least 5'2" and weigh at least 120 pounds excluded over 41 percent of the female population but less than 1 percent of the male population. This statistical evidence was held to constitute a prima facie case of sex discrimination. Id., pages 330-331.

I. The Plaintiff's Applications--Disparate Impact

The plaintiff has not clearly identified any particular employment practice of the defendant County of Orange which had an adverse impact upon members of his protected class, black males or black males over age 40. The

plaintiff's points and authorities attempt to identify certain practices including "(1) discounting education over experience; (2) the underrepresentation of blacks in their workforce; and (3) not permitting testing for those persons of a protected class who meet minimum qualifications". (Plaintiff's Answer to Defendants' Motion, etc., filed May 21, 1985, pages 23-24.) In oral argument, the plaintiff identified the challenged employment practice as the use of subjective judgment by persons who screen applications to determine if a given applicant meets minimum stated qualifications.

At least one of these alleged "employment practices" is not a practice at all in the sense that the term is used in Griggs, supra. Underrepresentation of blacks is a possible result of an

employment practice, not an employment practice itself. The plaintiff has only vaguely identified the parameters of the other three challenged employment practices.

The plaintiff has offered virtually no statistical evidence designed to show that the use of the identified employment practices adversely affect black males or black males over age 40. Thus, the plaintiff has not presented any statistical evidence showing or tending to show that a challenged employment practice has a disproportionate impact upon black male job applicants. The only vaguely pertinent statistic which the plaintiff has offered is the fact that the Orange County Superior Court employed no black males as of April, 1984. (Plaintiff's Answer to Defendants' Motion, etc, filed May 21, 1985, Exhibit 11, p. 247.) This

statistic does not, in and of itself, demonstrate that an identified employment practice discriminates against black males.

The defendants have not presented any evidence which conclusively demonstrates that the plaintiff's specified employment practices do not have an adverse impact on black males. The defendants have merely proferred evidence which shows or tends to show that the County of Orange employs a larger percentage of blacks than the percentage of blacks in the Orange County population or work force. (See Defendants' Statement of Uncontroverted Facts and Conclusions of Law, lodged April 29, 1985, pages 5-8.) This statistical presentation does not conclusively rebut the plaintiff's vague claims of employment practices having an adverse impact

upon black males.

Upon analysis, the defendants have not demonstrated that there is "no genuine issue of material fact" presented by the plaintiff in this Title VII adverse impact claim. Rule 56(c), F.R.Civ.P. An issue of fact exists as to whether the defendants maintained employment practices which had an adverse impact upon black males or black males over 40 years old.

The Magistrate recognizes that it appears, based upon the presentations of the parties at this time, that the plaintiff will not be able to present a prima facie adverse impact case at trial. The defendants have not, however, presented any authority to the court which supports the proposition that a plaintiff may be compelled to demonstrate the existence of a prima facie case in

response to a summary judgment motion.

The Defendants' Motion For Summary judgment should be denied as to the plaintiff's Title VII adverse impact claims. The court must thus consider the defendants' motion for summary adjudication of certain issues as to certain defendants pursuant to Rule 56(d), F.R.Civ.P.

J. Rule 56(d), F.R.Civ.P.

If a court denies a motion for summary judgment upon the whole case, it may make an order specifying "the facts that appear without substantial controversy". Rule 56(d), F.R.Civ.P. The defendants here request an order declaring that the plaintiff may not recover punitive damages from any party, that the plaintiff may not obtain back pay from the individual defendants who are County of Orange employees, that defendants

Bastanchury and Avillar be dismissed entirely, and that defendants Scoville, Wilson, Avillar, and Bastanchury be dismissed as immune.

K. Liability For Back Pay And Punitive Damages

In his First Amended Complaint the plaintiff requests the court for certain injunctive relief, back pay, punitive damages, and the costs of the suit. The Title VII cause of action is created by statute. The statute makes back pay awards payable only by employers. 42 U.S.C. § 2000e-5(g). The individual defendants in this action are not employers. They are all employees of defendant County of Orange. The individual defendants cannot be held liable for any back pay awards. Padway v. Palches, 665 F.2d 965, 968 (9th Cir. 1982); Clanton v. Orleans Parish School Board, 649 F.2d 1084, 1099 (5th Cir.

1981). A back pay award may only be assessed against the employer defendant, the County of Orange. In the light of this ruling, the defendants' contention that certain defendants are entitled to official immunity need not be considered.

Punitive damages may not be assessed against any party in a Title VII action. Padway, supra, p. 968. That remedy was not created by statute. Id.

The court should therefore enter an order pursuant to Rule 56(d), F.R.Civ.P., dismissing all punitive damages claims as against all defendants and all back pay claims as against all individual defendants.

L. Defendants Bastanchury And Avillar

The defendants Bastanchury and Avillar have each filed declarations stating that neither was ever involved in any way in the handling, review, or

decision-making process concerning any of the plaintiff's job applications to the County of Orange or the Orange County Superior court. (Defendants' Memorandum of Points and Authorities, filed April 29, 1985, Declarations of Ben Avillar and Maria Bastanchury.) The plaintiff has not rebutted these declarations. he appears to claim that defendant Avillar should be responsible because Avillar held the title of Affirmative Action Officer for the County of Orange during the period of the plaintiff's employment applications. The plaintiff's theory as to defendant Bastanchury is that she held a position which supervised the Affirmative Action Coordinator. (Plaintiff's Answer to Defendants' Motion, filed may 21, 1985, pages 24-26.)

Defendants Bastanchury and Avillar should be dismissed. Their declarations

unequivocally establish that they each had no involvement with the plaintiff's case.

CONCLUSION

In the light of the foregoing, the magistrate recommends that the court:

(1) Grant partial summary judgment for the defendants dismissing all of the plaintiff's Title VII disparate treatment claims as against all defendants;

(2) Deny summary judgment for the defendants on the plaintiff's disparate impact claims;

(3) Dismiss all punitive damage claims as against all defendants;

(4) Dismiss all back pay claims as against all defendants other than the defendant County of Orange; and

(5) Dismiss the complaint entirely as against defendants Bastanchury and Avillar.

The action should continue as to the plaintiff's Title VII adverse impact claims seeking back pay as against defendant County of Orange and injunctive relief against all defendants other than Bastanchury and Avillar.

DATED: This 13th day of August, 1985.

s/s James W. McMahon
JAMES W. McMAHON
United States Magistrate

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KENNETH ROBINSON, Plaintiff, vs. MICHAEL ADAMS, et al., Defendants.	No. CV 83-6823-IH(Mc) Entered Mar 21 1985 PARTIAL SUMMARY JUDGMENT

Pursuant to the order of the court adopting the findings, conclusions, and recommendations of the United States Magistrate,

IT IS ADJUDGED that partial summary judgment is granted in favor of the defendants as to all of the plaintiff's claims of employment discrimination under 42 U.S.C. §1981.

DATED: This 14th day of March, 1985.

/s/ Irving Hill

IRVING HILL
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KENNETH ROBINSON,	)	No.
	)	CV 83-6823-IH(Mc)
Plaintiff,	)	Filed Mar 14 1985
	)	
vs.	)	ORDER ADOPTING
	)	FINDINGS, CONCLU-
MICHAEL ADAMS,	)	SIONS, AND RECOM-
	)	MENDATIONS OF
Defendants.	)	UNITED STATES
	)	MAGISTRATE

Pursuant to 28 U.S.C. §636(b)(1)(B), the court has reviewed the complaint, all of the records and files herein, the attached Report and Recommendation of the United States Magistrate, and the Plaintiff's Objections to the Report and Recommendation, and concurs with and adopts the findings and conclusions of the Magistrate.

IT IS HEREBY ORDERED that partial summary judgment is granted in favor of the defendants as to all of the plaintiff's claims of employment discrimina-

tion under 42 U.S.C. §1981.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate's Report and Recommendation, and the Partial Summary Judgment herein by United States mail on the plaintiff and on counsel for the defendants.

DATED: This 14th day of March, 1985.

/s/ Irving Hill

IRVING HILL
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KENNETH ROBINSON,	)	No.
	)	CV 83-6823-IH(Mc)
Plaintiff,	)	Filed Feb 14 1985
	)	
vs.	)	PARTIAL REPORT AND
	)	RECOMMENDATION OF
MICHAEL ADAMS,	)	UNITED STATES
et al.,	)	MAGISTRATE
	)	
Defendants.	)	
	)	

This Report and Recommendation is filed pursuant to the provisions of 28 U.S.C. §636(b)(1)(B) and General Order No. 194 of the United States District Court for the Central District of California.

The pro se plaintiff has filed an employment discrimination complaint alleging that the defendants discriminated against the plaintiff by failing to hire the plaintiff for certain jobs with the County of Orange because of the plaintiff's race. The defendants have

now moved for summary judgment on all of the plaintiff's claims asserted under 42 U.S.C. §1981. The plaintiff has also moved for summary judgment against the defendants on his §1981 claims. The Magistrate recommends that the court grant partial summary judgment in favor of the defendants against the plaintiff on the §1981 claims. The Magistrate further recommends that the plaintiff's motion for summary judgment be denied.

The plaintiff is a black male who applied for four separate jobs with the County of Orange in the summer of 1983. The defendants are the County of Orange, the Superior Court of the County of Orange (the employer for one of the positions, Probate Examiner I), and certain individual employees of the County of Orange who processed the plaintiff's various job applications or

who denied the plaintiff's administrative complaints of employment discrimination.

The plaintiff's First Amended/Supplemental Complaint (filed August 21, 1984) invokes the jurisdiction of the court pursuant to 28 U.S.C. §§1337 and 1343(4) (sic) and pursuant to 42 U.S.C. §2000e-5(f)(3). The First Amended Complaint states claims for relief under 42 U.S.C. §1981 and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e - 2000e-17. The First Amended Complaint alleges that the plaintiff applied for four separate jobs with the County of Orange - Administrative Analyst III, Employment Services Representative IV, Investigator-Social Services, and Probate Examiner I, that the plaintiff met the minimum qualifications for the jobs, but that the plaintiff was denied the jobs because of his race. As relief,

the complaint requests back pay, punitive damages totalling one million dollars, attorney's fees, and injunctive relief. The defendants' answer denies any acts of discrimination and asserts various affirmative defenses.

DISCUSSION

The defendants have filed a motion for summary judgment directed only to the plaintiff's claims under 42 U.S.C. §1981. An analysis of these claims is made difficult by the failure of the pro se plaintiff to file a "Statement of Genuine Issues" setting forth all material facts as to which he contends that there exists a genuine issue to be litigated. See Local Rule 7.14.2. The plaintiff has filed a document entitled "Statement of Genuine Issues" (filed August 24, 1984) which is, in reality, a memorandum of points and authorities in opposition to

the defendants' motion for summary judgment. The plaintiff has failed to list the material facts which he claims are genuinely at issue in the case and failed to present declarations tending to rebut the defendants' declarations. On this record, the court may grant the defendants' motion for summary judgment on the ground that the plaintiff has failed to present an adequate "Statement of Genuine Issues" and that he has failed to present any declarations which rebut the declarations of the defendants. See Local Rule 7.14.3. The Magistrate recommends, however, that the court consider and grant defendants' motion on the merits.

A. Summary Judgment

A court must enter summary judgment in favor of a party if the pleadings and the evidence submitted in support of the

motion "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". Rule 56(c), F.R.Civ.P. If the court is unable to render summary judgment upon the whole case the court may enter a partial summary judgment or enter an order "specifying the facts that appear without substantial controversy . . . .". Rule 56(d), F.R.Civ.P.

B. 42 U.S.C.§1981

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . .". 42 U.S.C. §1981. Section 1981 creates a remedy for racial discrimination in employment which is independent of the Title VII remedy. Gay v. Waiters And

Dairy Lunchmen's Union, Local No. 30, 694 F.2d 531, 536 (9th Cir. 1982). A plaintiff alleging employment discrimination which violates §1981 must prove intentional discrimination. General Building Contractors Association, Inc. v. Pennsylvania, ____ U.S. ____, 102 S.Ct. 3141, 3150, 73 L.Ed.2d 835 (1982).

A plaintiff may prove a prima facie case of intentional employment discrimination by proof of the four elements articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Gay, supra, p. 538. These elements are a showing:

(1) that the plaintiff belongs to a racial minority;

(2) that the plaintiff applied and was qualified for a job for which the employer was seeking applicants;

(3) that, despite the plaintiff's qualifications, the plaintiff was rejected; and

(4) that after the plaintiff's rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications.

McDonnell Douglas v. Green, supra, p. 802. A plaintiff may also establish a prima facie case of intentional discrimination by other modes of proof. Gay, supra, p. 538.

A court may grant summary judgment against a plaintiff claiming intentional employment discrimination under §1981 when the plaintiff's employment application was rejected because the application did not contain information establishing that the plaintiff possessed the specific

qualifications sought by the employer in a job announcement. Tagupa v. Board of Directors, 633 F.2d 1309, 1311-1312 (9th Cir. 1980). A job applicant who files an application which does not establish that he possesses the required qualifications is deemed to have failed to apply for the position within the meaning of the guidelines laid down in McDonnell Douglas v. Green. Tagupa, supra, p. 1311.

C. Administrative Analyst III

1. Job Prerequisites

The job announcement for the position of Administrative Analyst III required applicants to possess three years of experience. The announcement listed as a prerequisite "[t]hree years of experience that requires the application of the knowledges (sic) and abilities listed as minimum qualifications; education can be substituted for up to

one year at the rate of three semester units for one month of experience . . . .". (Defendants' Index of Exhibits (filed August 17, 1984) hereinafter cited as "Defendants' Index", Exhibit 2, p. 14). The knowledge and abilities generally listed as qualifications included administrative skills such as those needed to gather information, prepare reports, administer and evaluate programs, prepare budgets, develop plans, prepare organizational charts, etc. Id., pps. 14-15. In context, it is clear that there was a requirement that job applicants have three years of administrative experience or two years of administrative experience plus an educational substitute equivalent to one year's experience.

2. Plaintiff's Application

The plaintiff's application lists two jobs which could arguably demonstrate

administrative experience, a position as an assistant registrar at a college for which the plaintiff worked two years and nine months, and a position as a manager for an export/import company. The plaintiff's application did not state whether these former jobs were full or part time and did not state the number of hours worked per week at each job. Id., Exhibit 1, p. 5.

3. The Selection Process

Defendant Joan Wilson, who is employed as a Senior Administrative Analyst for the County of Orange, processed the applications for the Administrative Analyst III job. Defendant Wilson screened the plaintiff's application and rejected it because the application contained insufficient information to establish that the plaintiff met the minimum requirements.

(Defendants' Memorandum of Points and Authorities in Support of Motion For Summary Judgment, filed August 17, 1984, Declaration of Joan Wilson, paragraph 5). In particular, the plaintiff's application failed to state whether his jobs as assistant registrar and manager of an export/import company were full-time or part-time jobs and failed to state the hours per week. This made it impossible to determine whether the plaintiff had the minimum required three years experience (Id., paragraph 7).

The plaintiff has offered no evidence which shows or tends to show that his application demonstrated that the plaintiff met the minimum qualification standard.

4. Magistrate's Discussion

The defendants have demonstrated that the plaintiff's employment applica-

tion for the position of Administrative Analyst III did not contain information establishing that the plaintiff possessed the minimum qualifications sought by the employer in the job announcement. The plaintiff has offered no evidence which shows or tends to show otherwise. Under the rule of Tagupa, supra, the plaintiff is deemed to have failed to have applied for the position within the meaning of the McDonnell Douglas v. Green test. The court should grant summary judgment as to the §1981 claim relating to the position of Administrative Analyst III.

D. Employment Services Representative IV

1. Job Prerequisites

The job announcement for the position of Employment Services Representative IV provides for the following prerequisites: "Education/Experience: One year of experience performing the duties of an Employment Services Representative II or six months as an Employment Services Representative III or equivalent experience that demonstrates possession of the knowledges (sic) and abilities listed above" (Defendants' Index, Exhibit 8, p. 48). The knowledge and abilities listed in the announcement generally describe skills needed to fulfill the role of a vocational counselor. The announcement specifically requires knowledge of the laws, regulations, and administrative guidelines which affect the Comprehensive Employment

and Training Act (CETA) and other special employment programs. (Id., pps. 47-48).

2. Plaintiff's Application

The plaintiff's application for the position of Employment Services Representative IV states that the plaintiff worked as a full-time assistant registrar at a college. The plaintiff stated that part of this job involved academic counseling of students. The plaintiff also stated that, as part of a course in vocational counseling, he had counseled various individuals to help them identify their vocational interests. (Defendants' Index, Exhibit 7, p. 43.) The plaintiff also stated that he had participated in a CETA program and studied the law regarding affirmative action and employment discrimination. (Id., p. 44).

3. The Selection Process

Defendant Georgia McCarthy, a

personnel specialist with the County of Orange, processed the plaintiff's application for the Employment Services Representative IV job. Defendant McCarthy screened the plaintiff's application and rejected it because the application did not show that the plaintiff had the required experience and because the information in the application did not contain enough specific information which demonstrated that the plaintiff possessed the required experience (Defendants' Memorandum, Declaration of Georgia McCarthy, paragraph 5).

In an answer to an interrogatory, the defendants stated that the plaintiff's application was rejected because the plaintiff's description of counseling activity in his job as assistant registrar did not state the amount of time

allotted to this activity. The activity was not "vocational" counseling. The plaintiff's vocational counseling activity undertaken as part of a course requirement did not constitute qualifying experience because the job requirements did not contain an educational substitute for experience. The fact that the plaintiff worked in a CETA program did not constitute experience working with CETA and federal and state regulations pertaining to employment. The plaintiff's application failed to state the percentages of his time spent on employee training and counseling. The application thus contained insufficient information to evaluate the plaintiff's qualifications (Defendants' Index, Exhibit pps. 23-24).

The plaintiff has offered no evidence which shows or tends to show

that his application contained the required experience. The plaintiff instead contends that the County of Orange has a general policy of accepting education as a substitute for job experience. (Plaintiff's Statement of Genuine Issues, filed August 24, 1984, p. 6).

4. Magistrate's Discussion

The plaintiff's application for Employment Services Representative IV did not contain information which established that the plaintiff had one year of experience performing the duties of Employment Services Representative II or six months of experience as an Employment Services Representative III or some other equivalent experience. The plaintiff apparently does not contend otherwise.

The plaintiff appears to contend that the defendant County of Orange has a

blanket policy allowing education to be substituted for experience in any job offered by the County. (Plaintiff's Statement of Genuine Issues, p. 6.) The plaintiff further contends that his law degree and course work for a master's degree in counseling should be considered to be a satisfactory substitute for the required one year of job experience. (Id., p. 6). In support of this contention, the plaintiff offers an unexplained exhibit which may be an excerpt from a County or Orange manual. The exhibit states as follows:

> The selection of candidates for interviews and appointments will be guided by the following criteria:
>
> 1. Experience, education and/or test results will be considered as indicators of ability to

> perform if directly related to the knowledges and abilities of the pertinent job classification.

(Id., Exhibit F, page 50). This statement appears to state that experience or education will be considered as a qualification for employment only if relevant to the requirements of a particular job. The statement does not establish a policy allowing education to be a substitute for any required experience listed in a job announcement.

The evidence demonstrates that the plaintiff's employment application did not contain information demonstrating that the plaintiff possessed the minimum qualifications sought by the employer. The plaintiff is deemed to have failed to apply for the position within the meaning of the McDonnell Douglas v. Green test.

Tagupa, supra. The court should grant summary judgment for the defendants as to the §1981 claim relating to the position of Employment Services Representative IV.

E. Investigator, Social Services

1. Job Prerequisites

The job announcement for the position of Investigator, Social Services provides for the following prerequisites:

> One year of experience as an Investigator Trainee, SSA, with Orange County, or one year experience at the fully qualified working level as a welfare fraud investigator in California welfare department, or two years of criminal investigative work which demonstrates the application or development of the required knowledges and abilities listed

above as minimum qualifications.

(Defendants' Index, Exhibit 13, p. 71).

2. Plaintiff's Application

The plaintiff's application for the positions of Investigator, Social Services contains no information indicating that the plaintiff had any work experience as a criminal investigator or investigator trainee. The application states that the plaintiff took a law school class entitled "Investigative Techniques". The application also states that the plaintiff has a law degree, a J.D. from Western State University. (Defendant's Index, Exhibit 12, p. 59, and p. 65.)

3. The Selection Process

Defendant Diane Coe, a personnel specialist with the County of Orange, processed the plaintiff's application for

the position of Investigator, Social Services. Defendant Coe screened the plaintiff's application and rejected it because the application did not demonstrate that the plaintiff possessed the required work experience as a criminal investigator. (Defendants' Memorandum Declaration of Diane Coe, paragraphs 5 and 7.) The plaintiff has offered no evidence showing or tending to show that his application demonstrated that he possessed the required criminal investigative experience.

4. Magistrate's Discussion

The plaintiff's application for Investigator, Social Services, did not contain information which established that the plaintiff had the required experience as a criminal investigator. The only evidence before the court is that the application was rejected because

the plaintiff did not qualify for the position. The plaintiff is deemed to have failed to apply for the position within the meaning of the McDonnell Douglas v. Green, test. Tagupa, supra. The court should grant summary judgment for the defendants as to the §1981 claim relating to the position of Investigator, Social Services.

The plaintiff argues that he should be able to substitute education for the required experience. That argument is considered and rejected above. It should be rejected here also.

F. Probate Examiner I

1. Job Prerequisites

The job announcement for the position of Probate Examiner I sought candidates with some experience and/or education relating to the functions, purposes, and procedures of probate law.

2. Plaintiff's Application

The plaintiff's application for the position of Probate Examiner I stated that the plaintiff had completed law school and attained a J.D. degree. While in law school, the plaintiff had taken a course in Wills and a ccurse in Civil Procedure. (Defendants' Index, Exhibit 17, pages 77-78.)

3. The Selection Process

Defendant Lura Scoville is employed as Probate Coordinator with Orange County Superior Court. She processed 97 applications for the position of Probate Examiner I, including the plaintiff's application. Defendant Scoville screened all the applications and rejected the plaintiff's application at the initial screening phase because he was not deemed to be one of the most qualified applicants. She found that the plaintiff

was not one of the most qualified applicants because the plaintiff's application did not contain any information which showed that the plaintiff had any previous job experience or any other experience in the probate field. The plaintiff's courses at law school did not reflect actual procedural practicing of the items of law and administration required before the Probate Court. Other job candidates had law degrees and relevant experience. The plaintiff, therefore, was not one of the most qualified applicants. (Defendants' Memorandum, Declaration of Lura Scoville, paragraphs 4 and 6.)

Defendant Scoville states in her declaration that she was not aware of the plaintiff's race at any time during the screening process. "The applications originally submitted to personnel by

plaintiff may have contained a separate sheet indicating background information such as race, that sheet was detached for internal record keeping purposes and was not included in the application this declarant [Scoville] reviewed." (Id., paragraph 7.)

The plaintiff contends that a copy of the plaintiff's application shows that racial information was contained on the plaintiff's application. (See Plaintiff's Statement of Genuine Issues, p. 9 and Defendants' Index, Exhibit 17, p. 80). A copy of the plaintiff's application for the position of Probate Examiner contains a section entitled "Applicant's Statistical Information". This section is reproduced in such a manner that the page must be rotated 90 degrees to read the statistical information. The statistical information section clearly

states that the applicant is a black male over 40 years of age. (Defendants' Index, Exhibit 17, p. 80.)

4. Magistrate's Discussion

The plaintiff must prove intentional discrimination to prove employment discrimination which is actionable conduct violative of 42 U.S.C. §1981. General Building Contractors Association, Inc. v. Pennsylvania, supra. The only evidence contained in the documents presented to the court in support of and in opposition to the defendants' motion for summary judgment is the testimony of defendant Scoville that she was not aware of the plaintiff's race at any time during the screening process and that the information in the application concerning the plaintiff's race was not included in the application of the plaintiff which she reviewed. It is impossible for a

person screening employment applications intentionally to discriminate against a job applicant because of the applicant's race, if the screener is not aware of the applicant's race.

Nothing that the plaintiff has presented to the court rebuts the declaration of defendant Scoville. The copies of the plaintiff's application which have been produced to the plaintiff by defendants in discovery (and which have been included as exhibits in this motion by both the plaintiff and the defendants) contain the statistical section which reveals the plaintiff's race. The plaintiff contends that this proves or tends to prove that the copy of the application reviewed by defendant Scoville also contained the statistical section revealing the plaintiff's race. There is no evidence before the court

which justifies that inference. There is no evidence before the court which reveals anything about the manner in which the plaintiff's employment application was maintained and reproduced by the defendant County of Orange. The plaintiff speculates that the copy of the application produced in discovery is substantially the same as the application reviewed by defendant Scoville. That speculation is not evidence which rebuts the direct evidence contained in the declaration of defendant Scoville. The plaintiff's speculation does not create a triable issue of fact. The court should grant summary judgment for the defendants as to the §1981 claim relating to the position of Probate Examiner I.

G. Plaintiff's Motion for Summary Judgment

In the light of the discussion above, there is no need for extended

discussion of the plaintiff's motion for summary judgment. That motion refers to the same §1981 claims and the same evidence discussed above with reference to the defendants' motion for summary judgment. The plaintiff's motion for summary judgment should be denied.

CONCLUSION

In the light of the foregoing, the Magistrate recommends that the court grant partial summary judgment for the defendants on all of the plaintiff's claims of employment discrimination under 42 U.S.C. §1981. The action should continue as to the plaintiff's Title VII claims which remain pending.

DATED: This 14th day of February, 1985.

/s/ James W. Mahon

JAMES W. McMAHON
United States Magistrate

Supreme Court, U.S.
FILED
OCT 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-520

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

KENNETH ROBINSON,

Petitioner,

VS.

MICHAEL ADAMS, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF THE CASE

In July and August, 1983, petitioner, Kenneth Robinson, applied for four separate positions with the County of Orange; (1) Administrative Analyst III; (2) Employment Services Representative IV; (3) Investigator - Social Services; and (4) Probate Examiner I. This last position, Probate Examiner I, fell within the auspices of the Orange County Superior Court.

In each instance, Robinson's application was denied at the initial screening phase due to a determination by the screener for each position that Robinson's written application did not reflect that he possessed the necessary qualifications and work experience required for the position, and/or that he was not

among the most qualified applicants.[1] (App. 46a-47a, 53a-54a, 58a, 60a-61a). Robinson did not reach the interview stage in the job application process based upon the inadequacy of the information before the screeners. Id. Moreover, each screener stated, under oath, that they were unaware of Robinson's race at the time they reviewed his application and determined that he did not possess the necessary skills and/or experience. Id.

Upon rejection of his employment discrimination claim by the Equal Employment Opportunity Commission, Robinson filed the present action against the County of Orange, the individual job screeners, and the Orange County Superior Court, premised upon the

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1. In each instance, references are to the appendix attached to the "Petition for a Writ Certiorari to the United States Court of Appeals for the Ninth Circuit" filed by petitioner Robinson.

Civil Rights Acts of 1866, 42 U.S.C., Section 1981. Respondents filed a motion for summary judgment attacking Robinson's ability to satisfy the prima facie elements of a section 1981 action as set forth in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). An Order was entered by the District Court on March 21, 1985 granting the County's motion with respect to the section 1981 claims. (App. 77a-80a).

Thereafter, Robinson successfully requested leave to amend his original complaint to state a Title VII action. The defendants then filed a second motion for summary judgment based on both the "disparate treatment" and "disparate impact" claims available under Title VII.

In denying Robinson's section 1981 and Title VII claims, the District Court

adopted the findings and conclusions of the Magistrate that petitioner Robinson had "failed to apply" for the positions of Administrative Analyst III, Employment Services Representative IV and Investigator-Social Services, pursuant to McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973), since the applications completed by Robinson did not reflect that he possessed the necessary qualifications for those positions. (App. 42a-43a).

With respect to the final position within the Orange County Superior Court, i.e. Probate Examiner I, Robinson's application did not indicate that he was among the "most qualified" applicants since there were other candidates who were also law school candidates, but who in addition had relevant experience in the Probate

court. (App. 61a).

The Magistrate thus recommended, and the District Court concurred, that summary judgment should be granted in favor of the County with respect to Robinson's Title VII disparate treatment claims. (App. 19a-21a).

With respect to Robinson's Title VII disparate impact claims, the District Court concluded that Robinson had failed to identify any particular employment practice of the County which had an adverse impact upon the class of black males. Moreover, the only "vaguely pertinent statistic" proffered by Robinson was the fact that the Orange County Superior Court (direct employer for the position of Probate Examiner I) had no black males as of April, 1984. The court determined, however, that "this statistic does not, in and of itself,

demonstrate that an identified employment practice discriminates against black males." (App. 27a-28a).

The District Court concluded that Robinson had presented no evidence which was sufficient to withstand the County's summary judgment motion:

> "Thus, the plaintiff did not attempt to show at the summary judgment hearing how many applicants applied for each of the jobs in issue in this case, how many of these applicants were black males, how many of the black male applicants were exclude[d] by the challenged employment practice, and whether the number of black males excluded from the applicant pool by the use of the challenged employment practice was disproportionate to the number of other applicants excluded by use of the employment practice. The plaintiff must be able to make a showing of this type in order to demonstrate the existence of a prima facie case that a 'facially neutral employment practice had a significantly discriminatory impact.' Connecticut v. Teal, supra, page 446." (App. 31a)

Thereafter, Robinson appealed the District Court's orders to the Ninth Circuit Court of Appeals. Following oral argument and a de novo review of the evidence presented by both the plaintiff and defendants, the Ninth Circuit affirmed the District Court's orders granting summary judgment in favor of the County as to Robinson's section 1981 and title VII disparate treatment and disparate impact claims.

Robinson then petitioned for "Rehearing With Suggestion For Rehearing En Banc." The panel voted to deny the petition for rehearing, and a majority of the full court rejected the suggestion for rehearing en banc. (App. 4a). The court's "Order and Amended Opinion" is attached to the present petition, commencing at Appendix page 1a.

With respect to the section 1981 and Title VII disparate treatment claims, the court below preliminarily noted that Robinson must be able to establish "intentional" discrimination. In support of their motion for summary judgment, the County presented affidavits of each of the application screeners wherein it was stated, under oath, that each screener was unaware of Robinson's race at the time they reviewed his application for the respective positions.

In response, Robinson merely asserted that the screeners "must have known" of his race since the copy of the applications he had completed and which were received via discovery contained a box wherein he had noted, by means of an "X" in a box, that he was black. The following paragraph, however, appeared at the top of the section

of the application form requesting such racial and demographic information:

> "Orange County is asking all applicants for positions to complete this form in order to comply with United States Government Equal Employment Opportunity requirements. Information you provide will not be used in any way as part of the testing process. This flap will not be duplicated or made available to hiring department [sic]. Data collected is used for statistical purposes and to measure the County's effectiveness of recruiting efforts." (App. 6a). (Emphasis in original)

In short, the screeners contended, through affidavits, that they were not aware of Robinson's race when they reviewed his application, i.e. they did not view the racial/demographic information during the initial screening process. The only controverting evidence supplied by Robinson was his own statement that the screeners "must have known."

The Court of Appeals did not view such evidence by Robinson as rising to a level which created a triable issue of fact for the jury.

> "Significantly, Robinson does not point to any evidence tending to show that this procedure resulted in the disclosure of racial information to application screeners in his or any other case. The only evidence in the record, the affidavits of the application screeners, unequivocally suggests that the procedure worked. Robinson's evidence on this issue is 'merely colorable' and is not 'significantly probative'. Liberty Lobby, 106 S. Ct. at 2511. Therefore, we hold that no genuine issue exists as to whether the application screeners were aware of his race." (App. 7a).

With respect to Title VII disparate impact claims, the court below emphasized that Robinson failed to identify a specific employment practice or criteria which had an adverse impact on the class of black males. (App. 9a).

In support of its motion for summary judgment, the County produced statistics reflecting that, while blacks comprised 1.2% of the Orange County population in 1984, 2.7% of the "professional" and "official/administrative" positions with the County of Orange, and 1.7% of the Orange County Superior Court positions were held by blacks. In response, Robinson noted that in April, 1984, there were no black males employed by the Superior Court.

The court below deemed that this statistic, standing alone, in the absence of an identifiable employment practice having an adverse impact on Robinson's class, was insufficient to create a genuine dispute regarding facts material to a prima facie case of disparate impact. Thus, summary judgment in favor of the County was deemed appropriate. (App. 9a-10a).

SUMMARY OF ARGUMENT

This Court should deny the present Petition for Writ of Certiorari since the decision of the court below does not conflict with the principles established by this Court, with the decisions of other circuits, or with the previous decisions of the Ninth Circuit. Moreover, this case does not present issues similar to those presented in two other cases under review by this court: Wards Cove Packing Co., Inc. v. Atonio, 827 F. 2d 439 (9th Cir. 1987), Cert. granted, 56 U.S.L.W. 3887 (June 28, 1988) and Harbison-Walker Refractories v. Brieck, no. 87-271, 56 U.S.L.W. 3647 (March 21, 1988).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. THE SECTION 1981 AND TITLE VII DISPARATE TREATMENT ANALYSIS UTILIZED BY THE COURT BELOW DOES NOT CONFLICT WITH THE PRINCIPLES ESTABLISHED BY THIS COURT, WITH THE DECISIONS OF OTHER CIRCUITS, OR WITH THE PREVIOUS DECISIONS OF THE NINTH CIRCUIT

1. Petitioner did not Produce Sufficient Evidence to Create a Genuine Issue of Fact in Response to the County's Evidence that the Screeners were "Unaware" of Robinson's Race at the Time of Reviewing His Applications.

The court below concluded that, to present a prima facie case of "intentional" discrimination pursuant to section 1981 or Title VII, it was incumbent that the County's employees, at a minimum, be aware

of Robinson's race at the time the applications were reviewed and rejected.

As noted above, each County employee stated, in an affidavit, that they did not know Robinson was black at the time they reviewed his application and determined that he either did not possess the requisite skills and/or experience, or was not among the most qualified applicants. In an effort to survive the motion for summary judgment, Robinson asserted that the screeners "may have known" or "could have discovered" that he was black because of the presence of his racial background on the application forms produced by the County during discovery. The court below did not view this assertion as sufficient to withstand the motion for summary judgment.

In the present Petition for Writ of Certiorari, Robinson contends that since the

"ultimate issue is the state of mind or intent of individuals," this matter does not "readily lend itself to summary disposition." Hutchinson v. Proxmire, 443 U.S. 111, 120 note 9. Robinson further relies upon Poller v. Columbia Broadcasting Company, 368 U.S. 464 (1962) for the proposition that the defendant should seldom, if ever, be granted summary judgment where his "state of mind" is at issue and the jury might disbelieve him or his witnesses as to this issue. (Petition, page 31-32).

The decision of the court below is not contrary to either Hutchinson, supra, nor Poller, supra. As explained by this court more recently in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986):

> "Our statement in Hutchinson v. Proxmire, 443 U.S. 111, 120 (1979), that proof of actual malice 'does not readily lend itself to summary disposition' was simply an acknowledgement of our general reluctance to grant special procedural protection to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." Id. at 256, n. 7.

Moreover, this court further explained that Poller, supra, does not insulate the non-moving party from summary judgment in the absence of concrete evidence:

> "We do not understand Poller, however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of a legal malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in

turn evidence that would support a jury verdict." Id. at 256.

In short, the court determined in Anderson, supra, that the plaintiff therein had not produced sufficient evidence to create a triable issue of fact for the jury in response to the defendants' affidavits regarding their belief in the truth of purportedly libelous statements. When evidence opposing a summary judgment is "merely colorable" or not "significantly probative" summary judgment may be granted. Id. at 249-250.

Such was the conclusion of the court below in response to Robinson's assertions that the County's screeners "may have known" or "could have discovered" his race when reviewing his application. The court below determined that Robinson failed to create a genuine issue as to whether these screeners

were aware of his race, therefore, summary judgment as to Robinson's section 1981 and Title VII disparate treatment claims was deemed appropriate.

2. The Present Case Does Not Address the Issues Under Review by This Court in Harbison-Walker

Petitioner suggests that the court should, at a minimum, hold the present petition pending resolution of Harbison-Walker, a disparate treatment case under the Age Discrimination in Employment Act, 29 U.S.C. section 621, et. seq. This court granted review of Harbison-Walker to address the question: "Can a plaintiff who alleges intentional discrimination survive a summary judgment merely by questioning the employer's business judgment, without presenting evidence, direct or indirect,

that the employer's judgment in fact was motivated by intent to discriminate?" (No. 87-271, 56 U.S.L.W. 3647).

The present case, in comparison, does not address, or raise the issues, of the quantum or nature of evidence needed to respond to an employer's asserted "business judgment" reasons for failing to employ (or deciding to terminate) an individual.

In Harbison-Walker, the employee asserted that he had been terminated because of his age, and thus filed an "intentional discrimination" claim pursuant to ADEA. The employer responded by asserting various "business judgment" reasons for the employee's discharge. The Third Circuit Court of Appeals, in reviewing the lower court's summary judgment in favor of the employer, placed upon the employer the burden of establishing that the former

employee would be "unable to introduce either direct evidence of a purpose to discriminate, or indirect evidence of that purpose by showing that the [employer's] proffered reason is subject to factual dispute."[2] (Emphasis in original)

Summary judgment in the present case, however, was granted on the basis that the claimant did not proffer sufficient evidence of a prima facie case of "intentional" discrimination, i.e. that the employer was even aware of his race at the time of the review of Robinson's applications. Thus, the burden did not shift to the County to prove the "business necessity" of its employment practices. The present decision does not, therefore, involve the same, or

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2. Brief for Petitioner at page 5, Harbison-Walker Refractories v. Brieck, no 87-271.

similar, analysis under review in Harbison-Walker.

B. THE DISPARATE IMPACT ANALYSIS UTILIZED BY THE COURT BELOW DOES NOT CONFLICT WITH THE PRINCIPLES ESTABLISHED BY THIS COURT, WITH THE DECISIONS OF OTHER CIRCUITS, OR WITH THE PREVIOUS DECISIONS OF THE NINTH CIRCUIT

1. The Court Below Did Not Hold, as a Matter of Law, That the Presence of Black Female Employees Was Sufficient to Withstand a Claim of Discrimination Against Black Males

Petitioner contends that the court below "treated the employment of black females as a justification for

discrimination against the plaintiff and other black males..." (Petition, page 20-21). Therefore, according to the petitioner, the decision of the court below conflicts with this Court's decision in Connecticut v. Teal, 457 U.S. 440 (1980), Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), and Furnco Construction Company v. Waters, ~~438 U.S.~~ 567, 569 (1978), as well as the Fifth Circuit Court of Appeals in Jeffries v. Harris County Community Action Association, 615 F. 2d 1025 (5th Cir. 1980), and the Tenth Circuit in Hicks v. Gates Rubber Company, 833 F. 2d 1406 (10th Cir. 1987). The court below did not, however, arrive at such a conclusion.

The court did acknowledge that the "most probative" statistics offered did not reflect discrimination by the County against the class of blacks as a whole. While

Robinson's evidence regarding the absence of black males in the Orange County Superior Court work force "could" result from racial discrimination, the court deemed that this fact, standing alone, was insufficient to withstand the County's motion for summary judgment. To create a prima facie case of discrimination against black males, Robinson must identify a specific employment practice and show a "causal relationship between the practice and the impact." (App. at 9a).

In short, both the District Court and the court below concurred that Robinson had simply not presented sufficient evidence of the elements of a prima facie case of racial discrimination under a disparate impact theory.

As explained by this court in Connecticut v. Teal, 457 U.S. 440 (1982), to establish a prima facie case of

discrimination, the claimant must show that a facially neutral practice has a significantly discriminatory impact on a protected class. This, the court below determined, Robinson did not do. Not only did Robinson fail to adequately identify the purported "employment practices," but he failed to establish the usefulness of "general population" statistics. The court below noted that it had consistently "rejected the usefulness of general population statistics as a proxy for the pool of potential applicants when the employer sought applicants for positions requiring special skills," citing Moore v. Hughes Helicopter, Inc., 708 F. 2d 475, 482-83 (9th Cir. 1983). This position was espoused by B. Schlei & P. Grossman in Employment Discrimination Law (2d Ed. 1983), wherein it is explained that when special

qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value. Id. at page 1338, note 13.

In sum, the court below did not recognize the statistics proffered by Robinson as a significantly probative reflection of an adverse impact on the protected class of black males. This determination, nor the court's analysis in reaching this conclusion, conflicts with the decisions of this Court, nor the courts of other circuits.

2. The Present Case Does Not Address the Issues Under Review by This Court in Wards Cove Packing v. Atonio

Petitioner contends that, as an

alternative to granting the present petition, this petition should be held pending the court's resolution in Wards Cove Packing Company, Inc. v. Atonio, 827 F. 2d 439 (9th Cir. 1987), Cert. granted (June 28, 1988), no. 87-1388, 56 U.S.L.W. 3887. The issues under review in Atonio, supra, however, are not similar to those set forth by the petitioner herein.

In Atonio, this court will review the question as to whether statistical evidence that shows only a concentration of minorities in jobs not at issue fail, as a matter of law, to establish disparate impact of hiring practices where the employer hires for at-issue jobs from outside his own work force and does not promote from within or provide training for such jobs, and where minorities are not under represented in at-

are not under represented in at-issue jobs.[3]

In support of its petition, Wards Cove explained that the court below held in that case that a "mere internal work force showing of 'concentration' of minorities, without regard to the factual circumstances, is sufficient to establish the disparate impact of the amalgam of practices plaintiffs choose to name."[4] As such, the Ninth Circuit Court purportedly departed form this court's decision in Hazelwood School District v. United States, 433 U.S. 299 (1977).

The present case, however, does not address the issues arising out of "concentration" of minorities in an

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3. Brief for Petitioner, at i Wards Cove Packing Company, Inc. v. Atonio, no 87-1387.

4. Brief for Petitioner, at pg. 9, Wards Cove Packing Company, Inc. v. Atonio, no. 87-1387.

employer's work force.

In Wards Cove Packing, supra, this court will also determine whether the court below "committed error in allowing employees to challenge the cumulative effect of a wide range of employment practices under the disparate impact model."[5] In support of Wards Cove's position regarding the court's error in this regard, Ward's Cove noted the unjust burden which had been inflicted by the court therein upon the employer, requiring the employer to prove the "business necessity" of each and every practice which the claimant alleged "combined" to "cause" the purported concentration of minorities.[6]

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5. Brief of Petitioner, at i, Ward's Cove Packing Co., Inc. v. Atonio, no. 87-1387.

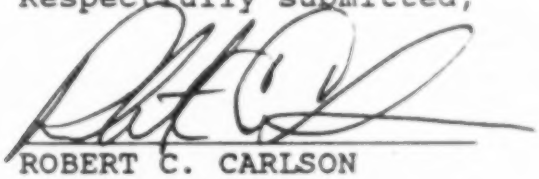
6. Brief of Petitioner, at pg. 18-19, Ward's Cove Packing v. Atonio, no. 87-1387.

Clearly, the analysis by this Court with respect to this issue is not applicable to the present matter wherein the court below determined that the claimant failed to offer probative statistics reflecting an adverse impact on the claimant's class. The court below did not address the employer's burdens with respect to establishing the "business necessity" of employment practices. The "delegation" of burdens issue was not addressed by the court below based on its determination that the claimant therein had initially failed to present statistics indicative of an adverse impact on the claimant's protected class. Thus, the present case does not offer or present issues similar to those under review in Wards Cove Packing v. Atonio.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,



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